POWER PURCHASE AGREEMENT

by and between

UTS SJ-1, LLC
as Provider

and

City of San José, California
as Customer

at

San José WPCP
700 Los Esteros Road
San José, CA 95134

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POWER PURCHASE AGREEMENT

This POWER PURCHASE AGREEMENT, dated as of _____, 2010, ("Effective Date") (as amended, amended and restated, supplemented or otherwise modified from time to time, the "Agreement"), is by and between UTS SJ-1, LLC, a Limited Liability Company formed under the laws of the State of Delaware ("Provider"), and City of San Jose, in the County of Santa Clara, State of California ("Customer").

RECITALS

WHEREAS, Customer owns real property located in California, as more fully described in Exhibit A hereto (the "Site"); and

WHEREAS, Customer desires that Provider install, maintain, operate and own and Provider desires to install, maintain, operate and own Systems (as hereinafter defined) to be located on the Sites; and

WHEREAS, Provider desires to sell, and Customer desires to purchase, Fuel Cell Services (as hereinafter defined), consisting of the delivery of electrical energy (the "Energy") generated by the Systems to the Sites and other services pursuant to the terms and conditions set forth herein.

NOW THEREFORE, in consideration of the mutual promises set forth below, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

AGREEMENT:

1. DefinitionsUnless otherwise required by the context in which any term appears: (a) capitalized terms used in this Agreement shall have the respective meanings set forth in this Section 1; (b) the singular shall include the plural and vice versa; (c) the word "including" shall mean "including, without limitation", (d) references to "Sections" and "Exhibits" shall be to sections and exhibits hereof; (e) the words "herein," "hereof" and "hereunder" shall refer to this Agreement as a whole and not to any particular section or subsection hereof; and (f) references to this Agreement shall include a reference to all exhibits hereto, as the same may be amended, modified, supplemented or replaced from time to time.

"Acceptable Digester Gas" Acceptable Digester Gas means digester gas meets criteria as further described in Exhibit D.

"Affiliate" means, with respect to any specified Person, any other Person directly or indirectly controlling, controlled by or under common control with such specified Person.

"Agreement" shall have the meaning set forth in the preamble.

"Annual Rate Escalator" shall mean the annual percentage increase in kWh Rates as set forth in Section 6.2.

"Applicable Law" shall mean, with respect to any Governmental Authority, any constitutional provision, law, statute, rule, regulation, ordinance, treaty, order, decree, judgment, decision, certificate, holding, injunction, registration, license, franchise, permit, authorization, guideline, governmental approval, consent or requirement of such Governmental Authority, enforceable at law or in equity, along with the interpretation and administration thereof by any Governmental Authority.

"Business Day" means each Day of the year excluding federal government holidays and weekends.

"Buyout Value" shall have the meaning set forth in Section 10.7.

"Claim Notice" shall have the meaning set forth in Section 14.1.

"Commercial Operation Date" shall have the meaning set forth in Section 3.4.1.

"Confidential Information" shall have the meaning set forth in Section 15.1.

"CPI" shall have the meaning set forth in Section 6.2.

"Customer" shall have the meaning set forth in the preamble.

"Customer Default" shall have the meaning set forth in Section 11.1.

"Day" means each day of the year including holidays and weekends.

"Digester Gas" means low BTU gas produced by the process of anaerobic digestion at the waste water treatment plant as further described in Exhibit D.

"Digester Gas Interconnection Point" shall mean a point at the periphery of the System where the digester gas is delivered by the Customer to the Provider as further described in Exhibit C. The Provider has responsibility of ownership and maintenance on the fuel cell side of the Digester Gas Interconnection Point. The Customer shall have ownership and maintenance responsibility on the other side of the Digester Gas Interconnection Point.

"Electrical Interconnection Point" shall mean a point at the periphery of the System where electricity is interconnected as further described in Exhibit C. The Provider has responsibility of ownership and maintenance on the fuel cell side of the Electrical Interconnection Point. The

Customer shall have ownership and maintenance responsibility on the other side of Electrical Interconnection Point.

"Energy" shall have the meaning set forth in the preamble.

"Environmental Attributes" means any and all credits, benefits, emissions reductions, offsets and allowances, howsoever entitled, attributable to an operation or process, including but not limited to renewable energy credits, as well as: (1) any avoided emissions of pollutants to the air, soil or water such as sulfur oxides (SOx), nitrogen oxides (NOx), carbon monoxide (CO) and other pollutants; (2) any avoided emissions of carbon dioxide (CO2), methane (CH4), nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulfur hexafluoride and other greenhouse gases (GHGs) that have been determined by the United Nations Intergovernmental Panel on Climate Change, or otherwise by law, to contribute to the actual or potential threat of altering the earth's climate by trapping heat in the atmosphere; and (3) the reporting rights to these avoided emissions, including the right of a party to report the ownership of accumulated offsets, green tags, or renewable energy credit reporting rights under any present or future federal, state, or local law, regulation or bill, and international or foreign emissions trading program (which, as of the Effective Date include certificates issued by Green-e in accordance with the Green-e Renewable Electric Certification Program, National Standard Version 1.3 administered by the Center of Resource Solutions).

"Environmental Financial Incentives" shall mean each of the following financial rebates and incentives that is in effect as of the Effective Date or may come into effect in the future, (excluding, however, any Environmental Attributes) (i) State or federal investment tax credits or grants, state or federal production tax credits or grants, or other tax benefits, and accelerated depreciation (collectively, "allowances"), howsoever named or referred to, with respect to any and all fuel, emissions, air quality, or other environmental characteristics, resulting from the use of fuel cells or the avoidance of the emission of any gas, chemical or other substance into the air, soil or water attributable to the sale of Energy generated by the System; and (ii) all reporting rights with respect to such allowances.

"Effective Date" shall have the meaning set forth in the Preamble.

"Expiration Date" shall have the meaning set forth in Section 10.1.

"Fair Market Value" means, with respect to any tangible asset or service, the price that would be negotiated in an arm's-length, free market transaction, for cash, between an informed, willing seller and an informed, willing buyer, neither of whom is under compulsion to complete the transaction. If the Fair Market value indicated by Provider in accordance purchase option of the system is disputed by the Purchaser, within thirty (30) Days of receipt of such notice from Provider, then the Parties shall mutually select an independent appraiser with experience and expertise in the industry. Such appraiser shall act reasonably and in good faith to determine Fair Market Value and shall set forth such determination in a written opinion delivered to the Parties. The valuation made

by the appraiser shall be binding upon the Parties in the absence of fraud or manifest error. The Parties shall equally share such appraisal costs.

"Force Majeure Event" shall mean, when used in connection with the performance of a Party's obligations under this Agreement, any of the following events to the extent not caused by such Party or its agents or employees:

(a) war, riot, acts of a public enemy or other civil disturbance;

(b) acts of God, including but not limited to, storms, floods, lightning, earthquakes, hailstorms, ice storms, tornados, typhoons, hurricanes, landslides, volcanic eruptions, range or forest fires, and objects striking the earth from space (such as meteorites), sabotage or destruction by a third party (other than any contractor retained by or on behalf of the Party) of facilities and equipment relating to the performance by the affected Party of its obligations under this Agreement; and

(c) strikes, walkouts, lockouts or similar industrial or labor actions or disputes.

"Fuel Cell Services" "shall mean all services provided to Customer by Provider hereunder, including the provision of Energy, including without limitation building, owning and operation of fuel cell power plant, providing heat for the heat transfer loop, associated maintenance of System, billing, customer service operations, associated financing activities including monetization of environmental incentives and credits, and associated coordination with regulatory and legislative bodies.

"Fuel Switch" shall have the meaning set forth in Section 4.7.

"Governmental Authority" shall mean any federal, state, regional, county, town, city, or municipal government, whether domestic or foreign, or any department, agency, bureau, or other administrative, regulatory or judicial body of any such government.

"Heat Transfer Interconnection Point" shall mean a point at the periphery of the System where the city hot water loop interfaces with the System as further described in Exhibit C. The Customer shall have ownership and maintenance responsibility for the city heat transfer loop. Provider will be responsible for necessary mechanical and electrical interfaces at the Heat Transfer Interconnection Point.

"Indemnified Party" shall have the meaning set forth in Section 14.1.

"Indemnifying Party" shall have the meaning set forth in Section 14.1.

"Installation Work" shall mean all work performed by Provider in connection with the furnishing, installation, testing and commissioning of each System.

"Interconnection Points" shall mean the Process Water Return Point, Electrical Interconnection Point, Digester Gas Interconnection Point, Heat Transfer Interconnection Point, Natural Gas Interconnection Points, and Potable Water Interconnection Point and Reclaimed Water Interconnection Point.

"kWh" shall have the meaning set forth in Section 4.3.1.

"kWh Rates" shall have the meaning set forth in Section 6.1.

"Lease" means that Site Lease Agreement in respect of the Site(s) entered into by Provider and Customer as of the date hereof.

"Liens" shall have the meaning set forth in Section 7.1.4.

"Meter" shall have the meaning set forth in Section 4.3.1.

"Monthly Period" shall mean the period commencing on the Commercial Operation Date and ending on the last Day of the calendar month in which the Commercial Operation Date occurs, and, thereafter, all subsequent one (1)-month periods during the Term.

"Monthly Production" shall mean, for each Monthly Period, the amount of Energy delivered during such Monthly Period.

"Natural Gas" shall have the meaning set forth in Section 4.7.

"Natural Gas Interconnection Point" shall mean a point at the periphery of the System where natural gas is delivered by the Customer to the Provider as further described in Exhibit C. The Provider has responsibility of ownership and maintenance on the fuel cell side of the interconnect. The Customer shall have ownership and maintenance responsibility on the other side of interconnect.

"O&M Work" shall have the meaning set forth in Section 4.1.1.

"Party" shall mean each of Customer and Provider.

"Person" shall mean any individual, corporation, partnership, company, joint venture, association, trust, unincorporated organization or Governmental Authority.

"Process Water Return Point" shall mean a point at the periphery of the Fuel Cell Power Plant where process water produced at the Fuel Cell Power Plant and water treatment unit is returned from the Provider to the Customer as further described in Exhibit C. The Provider has responsibility of ownership and maintenance on the fuel cell side of the interconnect. The Customer shall have ownership and maintenance responsibility on the other side of interconnect.

"Provider" shall have the meaning set forth in the preamble. For purposes of access rights and other rights necessary for Provider to perform its obligations hereunder, the term "Provider" shall include Provider's authorized agents, contractors and subcontractors.

"Provider Default" shall have the meaning set forth in Section 11.2.

"Rebates" shall mean any and all state or utility rebates or other funding offered for the development of digester gas fuel cell generation projects, including, but not limited to the California Self- Generation Incentive Program Rebate.

"Renewal Rate" shall have the meaning set forth in Section 10.3.1.

"Reporting Rights" means the right of Provider to report to any federal, state, or local agency, authority or other party, including without limitation under Section 1605(b) of the Energy Policy Act of 1992 and provisions of the Energy Policy Act of 2005, or under any present or future domestic, international or foreign emissions trading program, that Provider owns the Environmental Financial Incentives associated with the Energy, and the right to payment or SGIP Amount as additional price for Energy.

"Representatives" shall have the meaning set forth in Section 15.1.

"Outage" shall have the meaning set forth in Section 4.6.

"Service Provider" shall mean UTS BioEnergy SJ-1 LLC, its Affiliate, or such other qualified independent service provider that Provider may engage from time to time to provide the O&M Work or perform other services in connection with this Agreement.

"Site" shall have the meaning set forth in the first recital.

"SGIP Amount" means all amounts paid by the SGIP Program Administrator under the California Self-Generation Incentive Program with respect to the Systems; provided however, that the SGIP Amount shall include the incremental amount that may be paid under such program in the event that Fuel Cell Energy, Inc., the manufacturer of the Systems, is certified as a California supplier by the SGIP Program Administrator only to the extent that such incremental amount does not exceed $ 1,080,000 (One Million and Eighty Thousand Dollars)

"State Incentive" means revenue originating from state legislation and typically administered by electric utilities, such as the Self Generation Incentive Program.

"Systems" shall mean each of the fuel cell systems installed pursuant to this Agreement at the Site and more fully described in Exhibit B hereto; provided, however, that the term Systems shall only include equipment and materials up to but not including the Interconnection Point of any such System.

"Term" shall have the meaning set forth in Section 10.1.

"Termination Date" shall have the meaning set forth in Section 10.1.

"Termination Value" shall mean, at the time of calculation, an amount equal to the sum of (i) the costs of dismantling, packing, removing and transporting the Systems if necessary, (ii) the value of any Environmental Financial Incentives (including any applicable tax credits) and SGIP Amount that would have accrued to Provider if the termination of this Agreement did not occur, (iii) any and all fees, costs or charges related to the recapture of any Environmental Financial Incentive and SGIP Amount as a result of the termination of this Agreement, (iv) any contract termination or assignment fees or penalties (including without limitation financing prepayment or termination fees) incurred by Provider as a result of the termination of this Agreement, (v) Provider's transaction costs and expenses incurred as a result of the termination of this Agreement; and (vi) the present value of Customer's purchase obligations hereunder with respect to the Energy of the Systems for the remaining portion of the Term, which shall be calculated by applying the present value discount to the product of the following: the number of Days remaining in the term of the Agreement times the product of (x) the kWh Rates Customer would otherwise pay for such Energy pursuant to Section 6.1 (as such kWh Rates would have been escalated over time pursuant to Section 6.1) times (y) the Average kWh Output. For purposes of this definition, "Average kWh Output" means the daily average number of kWh of Energy actually delivered to Customer from the Systems beginning on the Commercial Operation Date through the date of termination of this Agreement. If termination of this Agreement occurs prior to the date that is one (1) full year after the Commercial Operation Date, for purposes hereof, it shall be assumed that the "Average kWh Output" of the Systems during such partial year was the expected daily number of kWh of Energy, calculated by dividing the "Estimated Annual 1st Year Production" for each System set forth in Exhibit C by 365. The present value discount shall be equal to the prevailing prime rate of interest as published in *The Wall Street Journal* on the Business Day preceding the date of termination of this Agreement.

"Transfer Taxes" shall have the meaning set forth in Section 6.2.

"Potable Water Interconnection Point" shall mean a point at the periphery of the System where fresh water is delivered from the Customer to the Provider as further described in Exhibit C. The Provider has responsibility of ownership and maintenance on the fuel cell side of the interconnect. The Customer shall have ownership and maintenance responsibility on the other side of interconnect.

"Reclaimed Water Interconnection Point" shall mean a point at the periphery of the System where reclaimed water is delivered from the Customer to the Provider as further described in Exhibit C. The Provider has responsibility of ownership and maintenance on the fuel cell side of the interconnect. The Customer shall have ownership and maintenance responsibility on the other side of interconnect.

2. Purchase and Sale of Fuel Cell ServicesCustomer engages Provider to provide the Fuel Cell Services to Customer at the Site, and Provider agrees to provide the Fuel Cell Services to Customer at the Sites, all in accordance with the terms and conditions set forth herein. Customer shall provide Provider with access to the Site in accordance with the terms of the Site Lease. In the event that Customer engages Provider to provide the Fuel Cell Services at more than one Site, the Parties acknowledge and agree that (a) any reference in this Agreement to (i) the "Site" shall mean each Site, as applicable, (ii) to the "Sites" shall mean to a given Site, as applicable (iii) to the "Systems" shall mean to the Systems furnished and installed at all Sites, as applicable and to the "System" shall mean to a given System furnished and installed at a given Site, as applicable; (b) except to the extent expressly provided, all provisions of the Agreement shall apply in respect of all such Sites, as applicable; and (c) this Agreement shall remain in full force and effect until terminated with respect to each and every Site to which Fuel Cell Services are provided hereunder. Provider may retain one or more contractors or subcontractors to fulfill its obligations hereunder; provided that Provider shall remain liable for performance hereunder.

3. Construction, Installation and Testing of SystemsWith respect to each Site on which a System is to be installed:

3.1 InstallationSubject to Section 3.2, Provider will cause the System to be designed, engineered, installed and constructed substantially in accordance with the terms of this Agreement and the Lease and the Special Construction Provisions set forth in Exhibit B and the Scope of Services (RFP) set forth in Exhibit F. Customer shall have the right to review and approve, such approval not to be unreasonably withheld or delayed, all construction plans. Provider shall organize the procurement of all materials and equipment for the Installation Work and maintain the same at the applicable site. Subject to the terms of the Lease, Provider shall perform Installation Work at the Site between the hours of 6:00 a.m. and 6:00 p.m., Monday through Friday (No work on Plant Holidays) in a manner that minimizes inconvenience to and interference with Customer's and Customer's invitees' and customers' use of the Site to the extent commercially practical.

3.2 Conditions Precedent to Commencement of Construction and InstallationPrior to commencement by the Provider of construction and installation activities with respect to a Site), Provider shall have:

3.2.1 Closed full financing for the Fuel Cell Services performed at the Site and, to the extent required pursuant to the applicable financing documentation, and shall have reached written agreement with the third party financing institution, pursuant to which Provider may assign some or all of its rights and obligations hereunder to such third party (or its designated corporate affiliate) under an amended and restated version of this Agreement to be negotiated prior to consummation of the financing for the Fuel Cell Services;

3.2.2 Obtained all necessary insurance for construction and installation of the System(s), subject to the terms of this Agreement and terms of the applicable financing, if any

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3.2.3 Obtained all necessary and required permits required for the performance of the work under this Agreement. Customer agrees to assist Provider in obtaining necessary permissions in connection with the installation, operation and maintenance of the Systems;

3.2.4 Provider and Customer shall have executed a Lease for the Site and, with respect to the Site, where the Customer's interest is a leasehold interest, the consent of the Customer's landlord shall have been obtained in accordance with such Lease;

3.2.5 Entered into the applicable contract(s) for construction and installation of the System(s), subject to the terms of the applicable financing, if any; and obtained all permits, licenses and other approvals required by Applicable Law, including any and all applicable environmental laws, including but not limited to, the California Environmental Quality Act, and shall retain the services of qualified consultants to provide all required research and documentation required for such compliance. To this end, Provider shall be solely responsible for the costs of the initial study required for environmental compliance. The initial study will be performed under the direction and control of Provider, subject to the requirements of this Section. Provider, following the completion of such initial study, may terminate this Agreement by written notice to Customer should environmental compliance measures or unforeseen site conditions render the Agreement economically disadvantageous for Provider or the time required to implement any environmental compliance measures or remediation exceed Provider's reasonable expectations. If Provider does not obtain all required environmental approvals in form and substance acceptable to Provider, Provider may terminate this Agreement by written notice to Customer. Nothing set forth herein shall be interpreted to require either Party to undertake environmental remediation at the Sites if mandated by law, regulation or as a condition of regulatory approval prior to the construction of the System. The governing board of the Customer shall be the lead agency for the purposes of filing any and all required documents and obtaining the relevant approvals. Customer shall bear its own costs incurred as the lead agency and for review of environmental compliance.

Successful completion of the Conditions in Sections 3.2.1 - 3.2.5 above and Section 3.3 below shall be conditions precedent to Provider's obligations under this Agreement. If the activities contemplated in Sections 3.2.1 - 3.2.5 above and Section 3.3 are not completed by January 20, 2012, Provider shall have the option to terminate the Agreement without triggering the default provisions of this Agreement and neither party shall have any further liability under this Agreement. Alternatively, in the event that such conditions precedent are not satisfied by such date, the Parties may mutually agree to amend this Agreement to revise the date of Commercial Operation Date and term of this Agreement.

3.3 Utility ApprovalsNotwithstanding that Provider shall have the primary responsibility for preparing applications and obtaining all permits, licenses and approvals required for the performance of work under this Agreement, Customer agrees to assist Provider in obtaining necessary permits, licenses and approvals in connection with the installation, operation and maintenance of the Systems, including the submission of applications for interconnection of the System with the local electric utility. Customer shall not make any material changes to its electrical

equipment at any Site after the date on which the applicable utility interconnection application is submitted unless any such changes, individually or in the aggregate, would not adversely affect the approval by such utility of such interconnection. Should the local electric utility fail to approve the interconnection of the System with respect to a Site or Sites or require equipment in addition to the equipment set forth in Exhibit B in connection with such Sites, Provider may, at Provider's option, terminate this Agreement with respect to such Sites immediately subsequent to notification from the local utility. The Parties shall not be obligated to provide Fuel Cell Services if the applicable utility approvals are conditioned upon material upgrades to the existing electrical infrastructure and neither Party elects to provide for such upgrades. Customer also agrees to assist Provider and make all necessary repairs or changes to the existing electrical infrastructure so that the Site is eligible for state rebate funding.

3.4 Energy DeliveryThe date on which the deliveries of Energy to the applicable Site commence (the "Commercial Operation Date") shall be the date on which all of the following shall have occurred: (a) Provider shall have certified to Customer that the System is substantially complete and available for commercial operation, (b) all permits and licenses required to be obtained under Applicable Law in connection with the operation of the System shall have been obtained and be in full force and effect and (c) Customer shall have entered into an interconnection agreement with the local electricity utility. In no event shall Provider have any liability to Customer for a delay in the Commercial Operation Date. In no event shall Customer have any liability to Provider for a delay in the Commercial Operation Date due to Provider's negligence.

3.4.2 Customer Rebate Assistance. Customer shall take all reasonable measures to assist Provider in obtaining all Rebates currently available or subsequently made available in connection with the Systems installed at the Sites. If Provider believes that Customer is acting in bad faith, Provider shall notify Customer within seventy-two (72) hours. Provider and Customer shall work together to obtain all Rebates.

3.5 Risk of Loss; Exclusive ControlAs between the Parties, except as set forth in Section 4.9, Provider will be deemed to be in exclusive control (and responsible for any property damage or injuries to persons caused thereby) of Energy and all other and inputs and outputs of the System on Provider's side of but excluding the Interconnection Points and Customer will be deemed to be in exclusive control (and responsible for any property damage or injuries to persons caused thereby) of the Energy all other and inputs and outputs of the System at and from the Interconnection Points. Risk of loss related to Energy all other and inputs and outputs of the System will transfer from Provider to Customer at the Interconnection Points, except as set forth in Section 4.9.

3.6 Customer Responsibilities

Customer shall act expeditiously to build concrete pads and interconnections to bring utilities to the Interconnection Points to enable Provider Systems to be installed. Provider will promptly provide drawings and design guidance as per agreed schedule at the time of project kickoff.

4. Operation and Maintenance of SystemsO&M Work; Phone/Data Line

4.1.2 O&M Work.

Provider, at its sole cost and expense, shall provide or cause to be provided operation, repair, monitoring and maintenance services to the Systems during the Term of this Agreement, including the monitoring and maintenance of the metering equipment determining the quantity of electricity produced by the Systems (collectively, the "O&M Work"). Provider shall perform or cause to be performed the O&M Work to ensure that each System is capable of delivering Energy in accordance with the specifications set forth in Exhibit C. Any repair or maintenance costs incurred by Provider as a result of Customer's negligence or breach of his obligations hereunder shall be reimbursed by Customer.

4.1.3 Service Provider.

The Parties agree that if Provider has arranged for Service Provider to conduct the O&M Work and certain other services, Service Provider shall have the same rights described in this Agreement as are granted to Provider related to the O&M Work. Customer hereby acknowledges that performance by Service Provider of any Provider obligations in accordance with this Agreement is deemed to be performed on behalf of Provider and in satisfaction of such obligations. Invoicing, requests, reviews, delivery of reports, notices or other communications, management and/or other coordination contemplated under this Agreement may be made by Service Provider on behalf of Provider as if made directly by Provider.

4.1.4 Phone/Data Line.

Customer shall provide Provider access for necessary phone, computer, or other communication lines necessary to permit Provider to monitor the system, maintain the system and to keep records of the system, and Provider shall properly maintain and pay for such lines for the entire Term.

4.1.5 Utilities.

Customer shall provide Provider access to, properly maintain and pay for and potable water and process water return.

4.2 Malfunctions and EmergenciesEach of Customer and Provider shall notify the other within twenty-four (24) hours following the discovery by it of (a) any material malfunction in the operation of the System or (b) an interruption in the supply of Fuel Cell Services. Provider and Customer shall each designate personnel and establish procedures such that each Party may provide notice of such conditions requiring Provider's repair or alteration at all times, twenty-four (24) hours per Day, including weekends and holidays. Provider and Customer each shall notify the other Party immediately upon the discovery of an emergency condition in a System.

4.2.2 Provider shall commence repairs to any malfunctioning System and restore the supply of Energy as soon as reasonably possible after notice or upon its own discovery of any of the conditions specified in Section 4.2.1 during normal business hours and, subject to Section 2, take steps to mobilize personnel to commence repairs after notice or discovery of a condition requiring repair or other corrective action. If an emergency condition exists, Provider shall dispatch the appropriate personnel immediately upon becoming aware thereof to perform the necessary repairs or corrective action in an expeditious and safe manner for routine and emergency repairs, the Parties shall contact the persons set forth below:

Customer: Name: WPCP – Computer Room
Address: 700 Los Esteros Rd
Phone: 408-945-5317
Fax: 408-945-5442
Email: wpcelectric@sanjoseca.gov

Provider: Name: UTS BioEnergy Field Service
Address: 2211 Encinitas Blvd, Encinitas CA, 92024
Phone: (760) 436 8870
Fax: (760) 454 2887
Email: service@utsbioenergy.com

4.3 MeteringMaintenance and Testing. On Site where a System is installed, Provider shall install and maintain a utility-grade kilowatt-hour ("kWh") meter ("Meter") for the measurement of Energy provided to Customer at such Site, which shall measure the kWh output of such System on a continuous basis. Upon Customer's written request, Provider shall furnish a copy of all technical specifications and accuracy calibrations for each Meter, as well as all metering data and energy production calculations. Provider shall test the Meters on a reasonably frequent basis.

4.3.2 Customer Audits and Inspections. Up to twice per calendar year, Customer shall have the right to audit all such Meter data upon reasonable notice, and any such audit shall be at Customer's sole cost. Customer shall have a right of access to all meters at reasonable times and with reasonable prior notice for the purpose of verifying readings and calibrations.

4.3.3 Adjustments. If testing of a Meter pursuant to Section 4.3.1 or Section 4.3.2 indicates that such Meter is in error by more than two percent (2%), then Provider shall promptly repair or replace such Meter. Provider shall make a corresponding adjustment to the records of the amount of Energy based on such test results for (a) the actual period of time when such error caused inaccurate meter recordings, if such period can be determined to the mutual satisfaction of the Parties, or (b) if such period cannot be so determined, then a period equal to one-half (1/2) of the period from the later of (i) the date of the last previous test confirming accurate metering and (ii) the date the Meter was placed into service; provided, that such period shall in no case exceed two (2) years.

4.4 Title to SystemsProvider, or Provider's permitted assigns, shall at all time retain title to and be the legal and beneficial owner of all Systems, including the right to any tax credits available under federal or state law, and all Systems shall remain the property of Provider or Provider's assigns. Customer warrants and represents that it shall keep the System free from all liens, claims and encumbrances of its lenders and any other third parties (other than those created by Provider or its creditors). Provider shall be entitled to, and is hereby authorized to, file one or more precautionary UCC Financing Statements or fixture filings, as applicable, in such jurisdictions as it deems appropriate with respect to the Systems in order to protect its rights in the Systems. Systems shall be clearly marked and identified as being the property of the Provider or Provider's assigns. Neither Customer nor any party related thereto shall have the right or be deemed to operate any System.

4.5 OutagesIn the event of a scheduled or un scheduled outage when Customer is unable to take delivery of electricity at a given Site other than as a result of a Force Majeure Event, Provider shall reasonably estimate the amount of Energy that would have been delivered to Customer during such outage and shall invoice Customer for such amount, which shall be due and payable in accordance with Section 6.4.

4.6 Compliance with Utility SpecificationsProvider shall ensure that all Energy generated by each System conforms to applicable utility specifications for energy being generated and delivered to the applicable Site's electric distribution system, which shall include the installation of proper power conditioning and safety equipment, submittal of necessary specifications, coordination of utility testing and verification, and all related costs.

4.7 Fuel Delivery ObligationsFor the duration of the Term, the Customer is obligated to deliver adequate fuel to Provider to operate the fuel cell at the gross rated capacity of 1.4MW, in the form of Acceptable Digester Gas or pipeline quality natural gas ("Natural Gas") in accordance with the specifications, set forth in Exhibit D. Provider will monitor the gas composition for the first year of operation and will record VOC, Siloxanes and other critical impurities. After the end of the first year, the maximum levels of impurities will be noted. Provider and Customer with then established Revised Exhibit D that will reflect new standards for Acceptable Digester Gas at twice the maximum recorded imputy levels. The System is sensitive to incoming digester gas quality and has controls to switch to Natural Gas or a blend of fuels as required (a "Fuel Switch"). The System may have to switch to 100% Natural Gas or a blend (a) due to downtime of the gas conditioning equipment and/or (b) because the quality of the gas input to the conditioning equipment does not meet specifications for Acceptable Digester Gas. If the Fuel Switch occurs due to (a) above, a 48 hour period would be considered reasonable within which Provider will correct the situation. For this first 48 hour period the Provider will be responsible to pay for 50% of the Natural Gas cost. If the condition is not corrected within a 48 hour period, Provider will be responsible for 100% Natural Gas cost incurred by Customer using a revenue grade meter installed to monitor Natural Gas usage. If however the condition is caused directly or indirectly due to (b) above, Provider may continue to use 100% Natural Gas or a blend at Customer's expense until the situation is resolved on the Customer's end. Additionally the System will use 100% Natural Gas during fuel cell startup

period at Customer's expense. Provider will keep records of all such usages and will reconcile it on a quarterly basis to reimburse Customer for cost of Natural Gas that Provider is responsible for, based on the average cost of Natural Gas from the local utility during such quarterly period.

4.8 Control SignalsDuring the Term, Customer and Provider shall maintain and grant each other access to the necessary control signals to ensure the optimal performance of the System and related equipment including without limitation the gas delivery equipment, gas conditioning equipment, or the heat transfer unit. Customer and Provider shall install, maintain such signals and provide the interconnect that provides access to such signals. Control signals are further defined in Exhibit C

4.9 Heat TransferAs part of the System, Provider will furnish and maintain according to manufacturer's specifications, a heat recovery system designed to deliver 1.8 million Btu per hour under design conditions outlined in Exhibit E. Provider shall not be responsible for degradation in heat transfer capacity due conditions outside Seller's control like, the water quality in the circulation loop, incoming water temperature ambient temperature etc.

Customer agrees and acknowledges that Provider has the option to upgrade the system to improve performance and output and to reduce cost as and when technology upgrades are available. As a sole owner and operator of the system Provider does not need Customer consent for system upgrades.

4.10 System Disruptions.

Customer acknowledges and agrees that, if for reasons other than Provider's breach of its obligations hereunder, Customer withholds from Provider or otherwise interferes with or terminates the access rights to the Site necessary for Provider to operate the System prior to Expiration Date, a Customer Default would be triggered. Customer further acknowledges and agrees that if for reasons other than damage caused by the System or a Force Majeure Event, owner or lessee of the Site require or cause partial or complete disruption of Fuel Cell Services, Provider shall reasonably estimate the amount of Energy that would have been delivered to Customer during such disruption period and shall invoice Customer for such amount, which shall be due and payable in accordance with Section 6.4.

Customer further acknowledges and agrees that any loss of revenue to Provider due to disruption of Fuel Cell Services caused by malfunctions on Customer's side of Interconnection Points shall be the sole responsibility of Customer. Provider shall reasonably estimate the amount of Energy that would have been delivered to Customer during such disruption period and shall invoice Customer for such amount, which shall be due and payable in accordance with Section 6.4.

5. Purchase of Fuel Cell Services.

With respect to System installed on a Site pursuant to this Agreement:

DRAFT--Contact the Office of the City Clerk at (408)535-1260 or CityClerk@sanjoseca.gov for final document.

5.1 Purchase Requirement

Customer agrees to purchase one hundred percent (100%) of the Energy delivered or deemed delivered under Section 4.5 and by such System during the Term of this Agreement. While the Fuel Cell Services are calculated and billed on the basis of kWh of Energy as set forth in Section 6.1, Customer acknowledges and agrees that such Fuel Cell Services represent a package of services including the production and supply of electrical energy output from the System together with O&M Work, insurance, training, building energy conservation, demand reduction and any other associated services that Provider may provide under this Agreement to Customer. The payment for Fuel Cell Services is calculated to include all of the above services in the price per kWh of Energy provided to the Site through the System. Neither Party may claim that by this Agreement Provider is an electric utility subject to regulation as an electric utility or subject to regulated electricity rates. Provider shall not claim to be providing electric utility services to Customer and shall not interfere with Customer's ability to select an electric utility provider except that, to the extent Customer has a choice in selecting an electric utility provider or electricity Provider, Customer shall not select an electric utility provider or electricity Provider that requires, as part of their conditions for service, removal or discontinued operation of the System or the sales hereunder.

5.2 Environmental Attributes / Environmental Financial Incentives

Customer's purchase of Fuel Cell Services does not include the rights and ownership to any Environmental Attributes generated as a result of the project. Provider has an exclusive right retain, own and monetize 100% (one hundred percent) of the Environmental Attributes through the duration of the Term.

Customer shall not own any of the Environmental Financial Incentives, all of which shall be retained and owned by Provider. At each Party's request and expense, the other Party shall execute all such documents and instruments reasonably necessary or desirable to effect or evidence the requesting Party's right, title and interest in and to the Environmental Attributes or the Environmental Financial Incentives, as may be applicable. If the standards used to qualify the Environmental Attributes or Environmental Financial Incentives including for this purpose the amounts paid under California SGIP to which a Party is entitled under this Agreement are changed or modified, the other Party shall, at other Party's request and expense, use all reasonable efforts to cause the Environmental Attributes or Environmental Financial Incentives including for this purpose the amounts paid under California SGIP, as applicable, to comply with new standards as changed or modified.

5.2.1 Customer shall not take any action or suffer any omission at any Site that would have the effect of impairing the value to the Provider of the Environmental Attributes, Environmental Financial Incentives, or SGIP Amount. Customer shall be solely responsible for notifying the Provider of any action or omission that could impair such value and for consulting with the Provider as necessary to prevent impairment of the value of Environmental Attributes, Environmental Financial Incentives or SGIP Amount.

5.2.2 Provider will at all times retain all tax credits and depreciation associated with the Systems.

6. Price and Payment

6.1 PricePursuant to the terms of this Agreement starting at the Commercial Operation Date, Customer will pay Provider $0.11 per kWh (the "kWh Rate") for all Energy delivered or deemed delivered hereunder. This amount is to be paid on a monthly basis. Customer will pay Provider the amounts due within 30 Days of the end of the month for which such payment is due. As a prepayment of an additional amount for the price of Energy delivered hereunder, Customer agrees to assign, and to the extent legally permissible hereby assigns, to Provider the value of the SGIP Amount to which Customer would otherwise be entitled. It is the intent of the Parties that Customer make a prepayment for the price of Energy equal to the SGIP Amount, although Customer may be designated as the "incentive payee" or "host customer" on any forms or applications related to such SGIP Amount, and Provider and Customer shall work together in good faith to cause an amount equal to such SGIP Amount to be paid to Provider simultaneously with such amount being released by the SGIP Program Administrator and shall endeavor to have such amount paid directly to Provider or its designee as Customer's assignee. Other than as set forth in the immediately preceding sentence, Customer shall not be responsible for securing any SGIP grant moneys and makes no representation as to the amount of the SGIP payment that will actually be realized, and in no event shall bear any costs related thereto. Each of Customer and Provider agree that it shall take no position on any tax return or otherwise that is inconsistent with the treatment of the SGIP Amount is a prepayment by Customer for Energy. Notwithstanding the foregoing, in the event that Customer elects to extend this Agreement pursuant Section 10.3.1, Customer shall pay the Renewal Rate for Energy delivered during the Extension Term.

6.2 Price Adjustments.

The kWh Rate is applicable through the first anniversary of the Commercial Operation Date. The kWh Rate for periods beginning on the first anniversary of the Commercial Operation Date, and for each twelve month period thereafter during the Term, shall be the amount determined as provided in this Section 6.2. For each such twelve month period, the kWh Rate shall be determined by escalating the previous year kWh Rate by 3.25% ("Annual Rate Escalator"). If however, between the Commercial Operation Date and the tenth anniversary of the commercial operation date, the average "Core CPI", the Consumer Price Index minus food and energy components as published by Bureau of Labor Statistics of United States Department of Labor exceeded 3.25%, the Annual Rate Escalator will be adjusted to the trailing 10 year average for the remainder of the Term. Annual Rate Escalator will be capped at 4% and shall not be below 3.25% for the duration of the Term.

The Parties believe it improbable that the CPI will be discontinued during the Term. It is agreed, however, that in the event that the CPI is discontinued, the parties shall accept comparable statistics on the purchasing power of the consumer dollar, as computed and published at the time of any such discontinuation by a responsible financial periodical of recognized authority to be then

chosen by the parties. In the event the Parties cannot agree on a financial periodical as the source of said comparable statistics after attempting for thirty (30) Days to reach such an agreement, said periodical shall be chosen pursuant to Section 13.

Additionally Customer agrees that the pricing includes only the cost of all mandatory requirements from various permitting, legislative and regulatory agencies as of Effective Date of the Agreement. If the provider is required to make any additional improvements or modifications to the System or change its operation from that contemplated by this agreement (collectively, "Additional Improvements") as a result of any change in law, regulation, or permit after the Effective Date, Customer shall be responsible for all costs associated with such Additional Improvements either as a lump sum payment or equivalent price adjustments to the kWh Rate.

In the event Provider is able to obtain a property tax exemption, an annual credit of $35,000 (or prorated for a partial year) will be passed on to Customer provided that at least 11,000 MWh of Energy was delivered to Customer in that tax year. If the energy delivered to Customer falls below 11,000MWh, a prorated adjustment will be made to the amount of credit issued.

Provider will give Customer a 10% discount on the power generated from the fuel cell, for power produced in excess of 11,000,000 kWh in a year. A year starts on the Commercial Operation Date and at each anniversary thereafter.

6.3 Taxes Provider and Customer shall each pay any taxes due in accordance with the following:

6.3.1 Customer Taxes. Customer shall pay (and shall indemnify and hold Provider harmless on an after-tax basis from and against) all sales, use, excise, ad valorem, transfer and other similar taxes ("Transfer Taxes"), but excluding in all events taxes based on or measured by net income, that are imposed by any taxing authority arising out of or with respect to the purchase or sale of the Fuel Cell Services (regardless of whether such Transfer Taxes are imposed on Provider or Customer), together with any interest, penalties or additions to tax payable with respect to such Transfer Taxes. If Customer shall be required to by law to withhold or deduct any Transfer Taxes or other taxes imposed by any jurisdiction or any political subdivision from or in respect of any sum payable hereunder, the sum payable shall be increased as may be necessary so that, after taking all required deductions, Provider shall have received an amount equal to the sum it would have received had no such deductions been made. Provider will pay any ad valorem property tax imposed by a taxing authority on the Systems.

6.3.2 Provider Taxes. Provider will pay and hold harmless Customer from any sales or use tax imposed upon Customer arising from this Agreement, other than as set forth in the preceding Section 6.3.1, including but not limited to Provider's manufacture, installation and ownership of the Systems. Provider will pay and hold harmless Customer from property tax, if any, assessed on (i) Provider's use of the Site, to the extent described in the Lease; (ii) the System or Provider's ownership, installation or use thereof; or (iii) any other aspect of this Agreement. If

Customer shall be required by law to withhold or deduct any Transfer Taxes or other taxes imposed by any jurisdiction or any political subdivision from or in respect of any sum payable hereunder, the sum payable shall be increased as may be necessary so that, after making all required deductions, Provider shall have received an amount equal to the sum it would have received had no such deductions been made. Notwithstanding the foregoing, Customer shall pay and hold harmless Provider from sales and use taxes, if any, arising upon the transfer, if any, of both legal and beneficial ownership of the Systems to Customer pursuant to this Agreement.

6.4 Billing and PaymentBilling and payment for the Fuel Cell Services sold and purchased under this Agreement and any other amounts due and payable hereunder shall be as follows:

6.4.1 Payments. Subject to adjustment in accordance with the terms of this Agreement, specifically including, but not limited to, set-offs for Natural Gas purchases made under the provisions of Section 4.7 above, Customer shall pay Provider for each Monthly Period during the Term within thirty (30) Days following the last Day of each such Monthly Period a payment for the Energy delivered by each System during each such Monthly Period equal to the product of (a) Monthly Production for such System for the relevant month multiplied by (b) the applicable kWh Rate for Energy relating to such System, which payment shall be made by electronic funds transfer in immediately available funds to the accounted designated by Provider from time to time. All payments made here under shall be non refundable, be made free and clear of any tax, levy, assessment, duties or other charges and not subject to reduction, withholding, set-off, or adjustment of any kind.

6.4.2 Invoice Errors. Within thirty (30) Days after receipt of any invoice, Customer may provide written notice to Provider of any alleged error therein. Customer shall pay all undisputed amounts, including the undisputed portion of any invoice, in accordance with Section 6.1 by electronic funds transfer in immediately available funds to the account designated by Provider from time to time. If Provider notifies Customer in writing within thirty (30) Days of receipt of such notice that Provider disagrees with the allegation of error in the invoice, the Parties shall meet, by telephone conference call or otherwise, within ten (10) Days of Customer's response for the purpose of attempting to resolve the dispute. If the Parties are unable to resolve the dispute within thirty (30) Days after such initial meeting, such dispute shall subject to the dispute provisions set forth in Section 13 hereunder.

6.4.3 Late Payments. Any payment not made within the time limits specified in Section 6.1 or Section 6.4 shall bear interest from the date on which such payment was required to have been made through and including the date such payment is actually received by the Provider. Such interest shall accrue at a monthly rate equal to the lesser of the then prevailing prime rate of interest as published in *The Wall Street Journal* or the maximum interest rate permitted by applicable law.

7. General CovenantsCovenants of ProviderAs a material inducement to Customer's execution and delivery of this Agreement, Provider covenants and agrees to the following:

7.1.1 Permits and Approvals. While providing Fuel Cell Services, Provider shall obtain and maintain all approvals, consents, licenses, permits, and inspections from relevant Governmental Authorities, utility personnel, and the Site's owners, if Customer is not the owner of such Site, and other agreements and consents required to be obtained and maintained by Provider and to enable Provider to perform such work. Provider shall deliver copies of all permits and approvals obtained pursuant to this Section to Customer.

7.1.2 Security. Customer shall provide for security lighting and security fencing (6 feet, chain link or equivalent) of the Site, which may be accessed by Provider and Customer by locked gates to which only the Provider and Customer shall have either the keys or the combinations. Any additional security measures beyond the fencing agreed upon by the parties herein shall be the sole cost of the Provider. Customer shall not be obligated by this Agreement to patrol or otherwise undertake security measures beyond those that are a part of normal operation.

7.1.3 Health and Safety. Provider shall take all reasonably necessary safety precautions in providing the Fuel Cell Services and shall comply in all material respects with all Applicable Laws pertaining to the safety of persons and real and personal property.

7.1.4 Removal of Liens. Provider shall not directly or indirectly cause, create, incur, assume or suffer to exist any mortgage, pledge, lien (including mechanics', labor or materialman's lien), charge, security interest, encumbrance or claim of any nature ("Liens") on or with respect to the Site or any interest therein; provided that this Section 7.1.3 shall not limit Liens on the Systems. If Provider breaches its obligations under this Section, it shall immediately notify Customer in writing, shall promptly cause such Lien to be discharged and released of record without cost to Customer, and shall defend and indemnify Customer against all costs and expenses (including reasonable attorneys' fees and court costs at trial and on appeal) incurred in discharging and releasing such Lien.

7.1.5 Provider Records. Provider or Service Provider shall keep complete and accurate records of its operations hereunder and shall maintain such data as may be necessary to determine with reasonable accuracy any item relevant to this Agreement. Customer shall have the right to examine all such records insofar as may be necessary for the purpose of ascertaining the reasonableness and accuracy of any statements of costs relating to transactions hereunder.

7.2 Customer's CovenantsAs a material inducement to Provider's execution of this Agreement, Customer covenants and agrees as follows:

7.2.1 Notice of Damage. Customer shall promptly notify Provider of any matters it is aware of pertaining to any damage to or loss of the use of the System or that could reasonably be expected to adversely affect the System.

7.2.2 Liens. Customer shall not directly or indirectly cause, create, incur, assume or suffer to exist any Liens on or with respect to any System or any interest therein. Customer also shall pay promptly before a fine or penalty may attach to any System any taxes, charges or fees of whatever type of any relevant Governmental Authority for which Customer is responsible under Section 6.3. If Customer breaches its obligations under this Section, it shall immediately notify Provider in writing, shall promptly cause such Lien to be discharged and released of record without cost to Provider, and shall indemnify Provider against all costs and expenses (including reasonable attorneys' fees and court costs at trial and on appeal) incurred in discharging and releasing such Lien.

7.2.3 Consents and Approvals. Customer shall obtain and maintain, and secure and deliver to Provider copies of, all consents, approvals, permits, licenses, and authorizations relating to the performance of Customer's obligations and the rights granted by Customer hereunder, and that are required by the terms, conditions or provisions of any restriction or any agreement or instrument to which Customer is a party or by which Customer is bound, including completing applications for interconnection with Customer's local electric utility. Customer shall use best efforts to assist Provider in fulfilling Provider's responsibilities under Section 7.1.1.

7.2.4 Maintenance of Interconnection. Customer shall not interfere with the interconnection of the Systems to the electrical grid and to the extent required by the Site Lease. Customer shall ensure that all of the facilities to which Energy is delivered hereunder remain interconnected to the electrical grid during the entire Term, except as permitted under Section 4.6 and Section 9.

7.2.5 Customer Records. Customer shall keep complete and accurate records of its operations hereunder and shall maintain such data as may be necessary to determine with reasonable accuracy any item relevant to this Agreement. Provider shall have the right to examine all such records insofar as may be necessary for the purpose of ascertaining the reasonableness and accuracy of any statements of costs relating to transactions hereunder.

7.2.6 Health and Safety. Customer shall at all times maintain the areas of the Site consistent with all Applicable Laws pertaining to the health and safety of persons and property.

8. Insurance RequirementsProvider shall procure and maintain for the duration of the contract insurance against claims for injuries to persons or damages to property which may arise from, or in connection with, the performance of the work hereunder by the Provider, its agents, representatives, employees or subcontractors. The cost of such insurance shall be included in the cost of Energy.

8.1 Minimum Scope of Insurance

Coverage shall be at least as broad as:

a) The coverage provided by Insurance Services Office Commercial General Liability coverage ("occurrence" form CG 0001), including products and completed operations, and X, C, U (Explosion, Collapse and Underground); and
b) The coverage provided by Insurance Services Office form number CA 0001 covering Automobile Liability. Coverage shall include all owned, non-owned and hired automobile; and
c) Workers' Compensation insurance as required by the Labor Code of the State of California and Employers Liability insurance; and
d) Property insurance against all risks of loss to any Lessee improvements or betterments; and
e) Professional Liability Errors and Omissions insurance for all professional services.
f) Hazardous Materials Handling Insurance Requirements

There shall be no endorsement reducing the scope of coverage required above unless approved by the City's Risk Manager.

8.2 Minimum Limits of Insurance.

Lessee shall maintain limits no less than:

a) General Liability: $5,000,000 combined single limit per occurrence for bodily injury, personal injury, and property damage and

b) Automobile Liability: $1,000,000 combined single limit per accident for bodily injury and property damage; and

c) Workers' Compensation and Employers' Liability: Workers' Compensation limits as required by the Labor Code of the State of California and Employers' Liability limits of $1,000,000 per accident; and

d) Property Insurance: Full replacement cost with no coinsurance penalty provision; and

e) Professional Liability Errors and Omissions Insurance $2,000,000 each occurrence/aggregate limit; and

8.3 Hazardous Materials Handling Insurance Requirements as per follows:

Provider, at its sole cost and expense, and for the full term of this contract/permit or any renewal thereof, shall obtain and maintain all of the following insurance requirements, as well as such other greater requirements that may presently be, or in the future be, required by any governmental agency such as, but not limited to: The Department of Transportation (DOT); The Public Utilities

Commission (PUC); The Federal Registry; and the laws of the State of California; or by any ordinance or resolution or any amendments to such ordinance or resolution adopted by any governmental agency, for which jurisdiction exists under the contract/permit's area of operation or location under this contract/permit:

A. An environmental impairment liability policy with a minimum limit of not less than $5,000,000 combined single limit for bodily injury and property damage, and providing at least the following minimum coverage. (Deductibles not to exceed $50,000):

a) Emission, discharge, disposal, dispersal, release, seepage or escape of smoke, vapor, soot, fumes, acid, alkali, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere, or any water course or body of water, or the generation of odor, noise, vibrations, light, electricity, radiation, changes in temperature or any other sensory phenomena arising out of or in the course of the contract/permit's operations under this contract/permit, whether these incidents are gradual and fortuitous and neither expected nor intended by the contractor/permittee.

b) Sudden or gradual pollution incidents. All environmental cleanup costs whether imposed by law or voluntarily assumed by the contractor/permittee for damage caused by pollution ensuing from the contractor/permittee's activities at owned and non-owned sites used by contractor/permittee for treatment, stoppage or disposal of waste materials.

c) Environmental damage and/or impairment caused by a pollution incident occurring from the contractor/permittee's activities including coverage for liquid, gaseous, or solid materials, whether they are waste or non-waste materials.

d) Nuclear and non-nuclear hazardous materials handling coverage unless contract/permit is exclusively issued for non-nuclear materials.

B. <u>Deductibles and Self-Insured Retentions</u> Any deductibles or self-insured retentions must be declared to, and approved by, the City. At the option of the City, either: the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the City, its officials, employees, agents and contractors; or the vendor shall procure a bond guaranteeing payment of losses and related investigations, claim administration and defense expenses in an amount specified by the City.

C. <u>Other Insurance Provisions</u> The policies are to contain, or be endorsed to contain, the following provisions:

1. Commercial General Liability and Automobile Liability Coverage

i. The City, its officials, employees, agents and contractors are to be covered as an additional insured as respects: liability arising out of activities performed by, or on behalf of, the Contractor; products and completed operations of the Contractor; premises owned, leased or used by the Contractor; or automobiles owned, leased, hired or borrowed by the Contractor. The coverage shall contain no special limitations on the scope of protection afforded to the City, its officials, employees, agents and contractors

ii. The vendor's insurance coverage shall be primary insurance as respects the City, its officials, employees, agents and contractors. Any insurance or self-insurance maintained by the City, its officials, employees, agents or contractors shall be in excess of the Contractor's insurance and shall not contribute with it.

iii. Any failure to comply with reporting provisions of the policies shall not affect coverage provided to the City, its officials, employees, agents, or contractors.

iv. Coverage shall state that the vendor's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.

v. Coverage shall contain a waiver of subrogation in favor of The City, it's officials, employees, agents, and contractors

2. Workers' Compensation and Employers' Liability

Coverage shall contain waiver of subrogation in favor of the City of San Jose, its officers, employees, agents and contractors

3. All Coverages

Each insurance policy required by this Agreement shall be endorsed to state that coverage shall not be suspended, voided, canceled, reduced, or modified except after thirty (30) days' prior written notice has been given to the City, except that ten (10) days' prior written notice shall apply in the event of cancellation for non-payment of premium.

D. Acceptability of Insurers

Insurance is to be placed with insurers acceptable to the City's Risk Manager.

E. Verification of Coverage

Provider shall furnish the City with certificates of insurance and with original endorsements affecting coverage required by this clause. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf.

Proof of insurance shall be either emailed in pdf format to: Riskmgmt@sanjoseca.gov, or mailed to the following postal address (or any subsequent email or postal address as may be directed in writing by the Risk Manager):

City of San José - Human Resources
Risk Management
200 East Santa Clara St., 2nd Floor - Wing
San José, CA 95113-1905

F. Subcontractors Provider shall include all subcontractors as insures under its policies or shall obtain separate certificates and endorsements for each subcontractor.

G. Review of Coverage:

These insurance requirements shall be subject to periodic review by City's Risk Manager. Should the Risk Manager require any change in any coverage such change shall be communicated in writing to Provider and Provider shall comply with the said change within thirty (30) days of the date of receipt of the notice.

9. Force Majeure EventsIf either Party is prevented from or delayed in performing any of its obligations under this Agreement by reason of a Force Majeure Event, such Party shall notify the other Party in writing as soon as practicable after the onset of such Force Majeure Event and shall be excused from the performance of its obligations under this Agreement to the extent that such Force Majeure Event has interfered with such performance. The Party whose performance under this Agreement is prevented or delayed as the result of a Force Majeure Event shall use reasonable efforts to remedy its inability to perform. If a Party's failure to perform its obligations under this

Agreement is due to a Force Majeure Event, then such failure shall not be deemed a Provider Default or a Customer Default, as the case may be. In case a Force Majeure Event continues for at least one year with respect to a System at a Site, then either Party may terminate this Agreement with respect to such Site by written notice to the other. In such case, Customer shall not be subject to any liability to Provider or for the Termination Value of the System.

10. Term; Customer Options; TerminationTerm The term of this Agreement shall commence on the Commercial Operation Date and shall expire on the date (the "Expiration Date") that is (a) twenty (20) years after the Commercial Operation Date (the "Term"), or (b) the last Day of the Extension Term if effective in accordance with Section 10.3.1; each unless and until terminated earlier pursuant to Sections 3.2, 3.3, 9, 10.2.2, 10.6 or 12 (the date of any such termination, the "Termination Date").

10.2 Customer Options Upon Cessation of Business Operations at Site(s)If, prior to the end of the Term, Customer ceases to conduct business operations at a Site, vacates such Site, or is prevented from allowing operation of the System(s) on such Site:

10.2.1 "Move and Pay" Option. Customer may elect to pay or guarantee the payment of the remaining monthly amounts due under this Agreement to Provider, and cause the applicable System(s) to be kept in operation at such Site, in each case through the remainder of the Term.

10.2.2 Termination of Site(s) and Payment of Termination Value. If beginning in the sixth year following the Commercial Operation Date, Customer elects not to avail itself of the provisions of Section 10.2.1, then Customer shall so notify Provider, Provider shall remove the applicable System(s) and Customer shall pay to Provider the then-applicable Termination Value in respect of such System(s) as liquidated damages, whereupon this Agreement shall terminate with respect to the applicable Site(s). The Parties agree that actual damages to Provider if this Agreement is terminated with respect to a Site or Sites as contemplated in this Section 10.2 would be difficult to ascertain, and the applicable Termination Value is a reasonable approximation of the damages suffered by Provider as a result of early termination of this Agreement with respect to such Site or Sites.

10.3 Customer Options Upon Expiration of TermExtension of TermUpon prior written notice to Provider at least one-hundred eighty (180) Days prior to the Expiration Date, Customer shall have the option to renew the term of this Agreement for one (1) additional five (5)-year period (the "Extension Term"); provided, however that the Parties mutual agreement on a kWh Rate for the Extension Term ("the Renewal Rate") and other terms and conditions will be a condition precedent to the effectiveness of the Extension Term.

10.3.2 Purchase of Systems.

Upon prior written notice to Provider at least one-hundred eighty (180) Days prior to the Expiration Date, Customer shall have the option to purchase the System pursuant to Section 10.7

10.4 Provider Options Upon Expiration of Term

10.4.1 Removal of System. At the expiration of the Term if Customer has not exercised his extension or purchase option under Section 10.3 Provider has the option but not an obligation to remove the System at Provider's expense.

10.5 Payment of Termination Value on Termination Date. In the event that the Termination Date has occurred for reasons attributable to Customer, Customer shall be required to pay to Provider the then-applicable Termination Value as liquidated damages. The Parties agree that actual damages to Provider in the event the Termination Date occurs for causes attributable to Customer would be difficult to ascertain, and the applicable Termination Value is a reasonable approximation of the damages suffered by Provider as a result of early termination of this Agreement.

10.6 Provider TerminationProvider shall have the right, in Provider's sole and absolute discretion, to terminate this Agreement upon written notice:

10.6.1 at any time until construction of the first System hereunder at the applicable Site commences;

10.6.2 if the occurrence of an unstayed order of a court or administrative agency having the effect of subjecting the sales of Energy to federal or state regulation of prices and/or service;

10.6.3 upon the elimination or alteration of one or more Environmental Financial Incentives or other change in law, including a significant change in California SGIP that results in a material adverse economic impact on Provider; or

10.6.4 if expected production of digester gas does not support at least 75% of the System's rated capacity of 1.4MW or the digester gas provided by Customer does not meet fuel quality standards.

10.7 Customer Option to Purchase of System.

In connection with the tenth (10th) anniversary, and the Expiration Date (each a "Purchase Option Date") and so long as no Customer Default is continuing at such time, Provider grants to Customer the option to purchase the System from Provider. The Buyout Value will be the higher of $2.9M (Two Million and Nine Hundred Thousand Dollars) or Fair Market Value, if the purchase takes place on the tenth anniversary, and the higher of $500,000 (Five Hundred Thousand Dollars) or Fair Market Value if the purchase takes place on the Expiration Date. Customer will also be responsible for any transfer cost, legal fees, transactional cost, financing prepayment penalty or

termination fees, unrealized Environmental Attributes, and any other actual cost incurred by Provider in sale of the asset. Not less than one hundred twenty (120) Days prior to the applicable Purchase Option Date, Customer shall provide written notice to Provider of Customer's exercise of this option. Upon the exercise of the foregoing purchase option and receipt of payment, as applicable, Parties will execute all documents necessary to cause title to the System to pass to Customer, free and clear of any Liens immediately subsequent to the Purchase Option Date or Expiration Date. To the extent transferable, the remaining period, if any, on all warranties for the Systems will be transferred from Provider to Customer at Customer's sole expense. Upon receipt of payment by Provider, title to the Systems shall transfer to Customer as-is, where-is, provided, however, that Provider shall remove any encumbrances placed on the Systems by Provider.

11. DefaultsCustomer DefaultThe occurrence at any time of any of the following events shall constitute a "Customer Default":

11.1.1 Failure to Pay. The failure of Customer to pay on any three separate occasions during the Term any amounts owing to Provider on or before the Day following the date on which such amounts are due and payable under the terms of this Agreement and Customer's failure to cure each such failure within fifteen (15) Days after Customer receives written notice of each such failure from Provider;

11.1.2 Failure to Perform Other Obligations. Unless due to a Force Majeure Event excused by Section 9, the failure of Customer to perform or cause to be performed any other obligation required to be performed by Customer under this Agreement, or the failure of any representation and warranty set forth herein to be true and correct as and when made; provided, however, that if such failure by its nature can be cured, then Customer shall have a period of thirty (30) Business Days after receipt of written notice from Provider of such failure to Customer to cure the same and a Customer Default shall not be deemed to exist during such period; provided, further, that if Customer commences to cure such failure during such period and is diligently and in good faith attempting to effect such cure, said period shall be extended for one-hundred twenty (120) additional Days; provided, finally, that in any event if such failure shall continue for at least five (5) Days and shall result in lost revenue to Provider, Provider shall be entitled to reasonably estimate the amount of revenue that would have been obtained and shall invoice Customer therefor;

11.1.3 Bankruptcy, Etc. (a) Customer admits in writing its inability to pay its debts generally as they become due; (b) Customer files a petition or answer seeking reorganization or arrangement under the federal bankruptcy laws or any other applicable law or statute of the United States of America or any State, district or territory thereof; (c) Customer makes an assignment for the benefit of creditors; (d) Customer consents to the appointment of a receiver of the whole or any substantial part of its assets; (e) Customer has a petition in bankruptcy filed against it, and such petition is not dismissed within 90 Days after the filing thereof; (f) a court of competent jurisdiction enters an order, judgment, or decree appointing a receiver of the whole or any substantial part of Customer's assets, and such order, judgment or decree is not vacated or set aside or stayed within 90 Days from the date of entry thereof; or (g) under the provisions of any other law for the

relief or aid of debtors, any court of competent jurisdiction shall assume custody or control of the whole or any substantial part of Customer's assets and such custody or control is not terminated or stayed within 90 Days from the date of assumption of such custody or control; or

11.1.4 Lease Default. A material default by Customer under the Lease occurs.

11.2 Provider DefaultThe occurrence at any time of one of the following events shall constitute a "Provider Default":

11.2.1 Failure to Perform Obligations. Unless due to a Force Majeure Event excused by Section 9, the failure of Provider to perform or cause to be performed any obligation required to be performed by Provider under this Agreement or the failure of any representation and warranty set forth herein to be true and correct as and when made; provided, however, that if such failure by its nature can be cured, then Provider shall have a period of thirty (30) business Days after receipt of written notice from Customer of such failure to Provider to cure the same and a Provider Default shall not be deemed to exist during such period; provided, further, that if Provider commences to cure such failure during such period and is diligently and in good faith attempting to effect such cure, said period shall be extended for one-hundred twenty (120) additional Days;

11.2.2 Bankruptcy, Etc. (a) Provider admits in writing its inability to pay its debts generally as they become due; (b) Provider files a petition or answer seeking reorganization or arrangement under the federal bankruptcy laws or any other applicable law or statute of the United States of America or any State, district or territory thereof; (c) Provider makes an assignment for the benefit of creditors; (d) Provider consents to the appointment of a receiver of the whole or any substantial part of its assets; (e) Provider has a petition in bankruptcy filed against it, and such petition is not dismissed within 90 Days after the filing thereof; (f) a court of competent jurisdiction enters an order, judgment, or decree appointing a receiver of the whole or any substantial part of Provider's assets, and such order, judgment or decree is not vacated or set aside or stayed within 90 Days from the date of entry thereof; or (g) under the provisions of any other law for the relief or aid of debtors, any court of competent jurisdiction shall assume custody or control of the whole or any substantial part of Provider's assets and such custody or control is not terminated or stayed within 90 Days from the date of assumption of such custody or control; or

11.2.3 Lease Default. A material default by Provider under the Lease occurs.

12. Remedies Following DefaultCustomer's Remedies Upon Occurrence of a Provider DefaultTermination. If a Provider Default as described in Section above has occurred and is continuing, and if Provider fails to correct or cure the conditions causing such Provider Default within ten (10) Days after Provider shall have received Customer's written notice of Customer's

intent to terminate this Agreement as a result of such Provider Default, then this Agreement shall terminate and be of no further force or effect as of the last Day of such ten (10) Day period.

12.2 Provider's Remedies Upon Customer DefaultIf a Customer Default as described in Section 11.1 has occurred and is continuing on or after the Commercial Operation Date, and if Customer fails to correct or cure the conditions causing such Customer Default within ten (10) Days after the date on which Provider gives Customer written notice of Provider's intent to terminate this Agreement as a result of such Customer Default, then this Agreement shall terminate and be of no further force or effect as of the last Day of such ten (10) Day period and Provider shall have the right to (a) cause Customer to pay the greater of applicable Termination Value or the Fair Market Value of the Systems, in which case title to the Systems shall transfer to Customer upon such payment or (b) remove the Systems if necessary and cause Customer to pay the applicable Termination Value. If Customer does not pay the Termination Value in full as required hereunder, title to the Systems shall not transfer to Customer, and Provider, without limitation of the other rights and remedies available to it hereunder, shall have the right, but not the obligation, to enter onto the Sites and repossess the Systems, or any part thereof.

12.2.2 If a Customer Default as described in Section 11.1 has occurred and is continuing before the Commercial Operation Date, and if Customer fails to correct or cure the conditions causing such Customer Default within ten (10) Days after the date on which Provider gives Customer written notice of Provider's intent to terminate this Agreement as a result of such Customer Default, then this Agreement shall terminate and be of no further force or effect as of the last Day of such ten (10) Day period and Provider shall have the right to cause Customer to pay all (a) costs incurred by Provider in connection with this Agreement and Provider's performance hereunder up to the Termination Date, (b) contract termination or assignment fees or penalties (including without limitation financing prepayment or termination fees) incurred by Provider as a result of the termination of this Agreement, and (c) Provider's transaction costs and expenses incurred as a result of the termination of this Agreement.

12.3 No Consequential DamagesNothing in this Agreement is intended to cause either Party to be, and neither Party shall be, liable to the other Party for any lost business, lost profits or revenues from others or other special or consequential damages, all claims for which are hereby irrevocably waived by Customer and Provider. Notwithstanding the foregoing, none of the payments for Energy or any other amount specified as payable by Customer to Provider under the terms of this Agreement upon the termination of this Agreement shall be deemed consequential damages. Provider's liability hereunder shall be in all respects limited to amounts paid to it hereunder during the most recent twenty-fourth (24)-month period.

12.4 Effect of Termination of AgreementUpon the Termination Date or the Expiration Date, as applicable, any amounts then owing by a Party to the other Party shall become immediately due and payable and the then future obligations of Customer and Provider under this Agreement shall be terminated (other than the indemnity obligations set forth in Section 14). Such

termination shall not relieve either Party from obligations accrued prior to the effective date of termination or expiration.

13. DisputesAny dispute, controversy or claim (each, a "Dispute") arising out of or relating to this Agreement or any breach or alleged breach hereof, upon the agreement of the Parties, first shall be submitted to mediation. Said mediation shall commence no later than 30 Days after submission of the Dispute and shall be conducted at the locality where the Sites are situated and in accordance with the then prevailing rules of the Construction Industry Mediation Rules of the American Arbitration Association. In the event that the Dispute is not resolved pursuant to mediation or, in the event the Parties do not agree upon submission of the Dispute to mediation, each Party may pursue any rights and remedies as each may have, whether in law or at equity. Except to the extent that this Agreement expressly permits a Party to suspend performance, pending final resolution of a Dispute, the Parties shall each proceed diligently and faithfully with performance of their respective obligations under this Agreement.

14. IndemnificationTo the extent it may lawfully do so, Provider and Customer hereby indemnify, defend (with counsel of its choosing), and holds harmless the other party and its directors, agents, officers, employees and volunteers from and against any and all liability or claim of liability, loss or expense, including defense costs and legal fees and claims for damages of whatsoever character, nature and kind, whether directly or indirectly arising from or connected with an act or omission of the indemnifying party, or the indemnifying party's agent or employee engaged in an activity with respect to the Site or the operations of services under this Agreement, including, but not limited to, liability, expense, and claims for: bodily injury, death, personal injury, or property damage caused by negligence, creation or maintenance of a dangerous condition of property, breach of express or implied warranty of product, defectiveness of product, or intentional infliction of harm, including any workers' compensation suits, liability, or expense, arising from or connected with services performed by on behalf of the indemnifying party by any person pursuant to this Agreement; nonpayment for labor, materials, appliances, teams, or power, performed on, or furnished or contributed to the Site. Notwithstanding the above, neither the Provider nor the Customer shall be required to defend, indemnify and hold harmless the other for its own negligent acts and omissions or willful misconduct. It is the intent of the Parties that where negligence is determined to have been joint or contributory, principles of comparative negligence will be followed, and each Party shall bear the proportionate cost of any loss damage, expense or liability attributable to that Party's negligence.

14.1 Notice of ClaimsAny Party seeking indemnification hereunder (the "Indemnified Party") shall deliver to the other Party (the "Indemnifying Party") a notice describing the facts underlying its indemnification claim and the amount of such claim (each such notice a "Claim Notice"). Such Claim Notice shall be delivered promptly to the Indemnifying Party after the Indemnified Party receives notice that an action at law or a suit in equity has commenced; provided, however, that failure to deliver the Claim Notice as aforesaid shall not relieve the Indemnifying Party of its obligations under this Section 14, except to the extent that such Indemnifying Party has been prejudiced by such failure.

14.2 Defense of ActionIf requested by an Indemnified Party, the Indemnifying Party shall assume on behalf of the Indemnified Party, and conduct with due diligence and in good faith, the defense of such Indemnified Party with counsel reasonably satisfactory to the Indemnified Party; provided, however, that if the Indemnifying Party is a defendant in any such action and the Indemnified Party believes that there may be legal defenses available to it that are inconsistent with those available to the Indemnifying Party, the Indemnified Party shall have the right to select separate counsel to participate in its defense of such action at the Indemnifying Party's expense. If any claim, action, proceeding or investigation arises as to which the indemnity provided for in this Section 14 applies, and the Indemnifying Party fails to assume the defense of such claim, action, proceeding or investigation after having been requested to do so by the Indemnified Party, then the Indemnified Party may, at the Indemnifying Party's expense, contest or, with the prior written consent of the Indemnifying Party, which consent shall not be unreasonably withheld, settle such claim, action, proceeding or investigation. All costs and expenses incurred by the Indemnified Party in connection with any such contest or settlement shall be paid upon demand by the Indemnifying Party.

14.3 Survival of ProvisionsThe provisions of this Section 14 shall survive the expiration or termination of this Agreement.

15. Confidential InformationConfidentiality ObligationIf either Party provides information, including business plans, strategies, financial information, proprietary, patented, licensed, copyrighted or trademarked information or technical information regarding the design, operation and maintenance of the Systems, or of Customer's business ("Confidential Information") to the other or, if in the course of performing under this Agreement or negotiating this Agreement a Party learns Confidential Information regarding the facilities or plans of the other, the receiving Party shall (a) protect the Confidential Information from disclosure to third parties with the same degree of care accorded its own confidential and proprietary information, and (b) refrain from using such Confidential Information except in negotiating or performing under this Agreement. Notwithstanding the foregoing, a Party may provide such Confidential Information to its officers, directors, members, managers, employees, agents, contractors and consultants (collectively "Representatives"), and Affiliates, lenders, and potential assignees of this Agreement (provided that such potential assignees be bound by a written agreement restricting use and disclosure of Confidential Information), in each case whose access is reasonably necessary to the negotiation and performance of this Agreement. Each such recipient of Confidential Information shall be informed by the Party disclosing Confidential Information of its confidential nature, and shall be directed to treat such information confidentially and shall agree to abide by these provisions. In any event, each Party shall be liable (with respect to the other Party) for any breach of this provision by any entity to whom that Party improperly discloses Confidential Information. All Confidential Information shall remain the property of the disclosing Party.

15.2 Permitted DisclosuresNotwithstanding any other provision herein, neither Party shall be required to hold confidential any information that:

15.2.1 becomes publicly available other than through the receiving Party;

15.2.2 is required to be disclosed by a Governmental Authority or under Applicable Law or pursuant to a validly issued subpoena or pursuant to its legal obligations as a publicly held company, but a receiving Party subject to any such requirement shall promptly notify the disclosing Party of such requirement;

15.2.3 is independently developed by the receiving Party; or

15.2.4 becomes available to the receiving Party without restriction from a third party under no obligation of confidentiality.

15.3 Goodwill and PublicityThe Parties shall coordinate and cooperate with each other when making public announcements related to the execution and existence of this Agreement. At no time will the Provider acquire any rights whatsoever to any trademark, trade name, service mark, logo or other intellectual property right belonging to Customer. Customer shall have the right to publicize that it is serving as a "fuel cell host" for the System(s) and to display photographs of the System(s) in its advertising and promotional materials; provided that any such materials identify Provider as the owner and developer of the System(s) and shall be consistent with Section 5.2 of this Agreement. On all signage at Site(s), and in all publicly distributed materials and other public communications issued by either Party that refer to a System by name, such name shall be followed by a statement to the effect that Provider owns, and UTS BioEnergy operates, such System. Notwithstanding the foregoing and subject only to the provisions on confidential information set forth in this Section 15 of this Agreement, Provider shall have the right to publish factual information related to the System(s) on its website and through other forms of electronic media. Such information may include, but is not limited to, the location of any System, the name of the Customer, and other features of any System.

15.4 Enforcement of Confidentiality ObligationEach Party agrees that the disclosing Party would be irreparably injured by a breach of this Section 15 by the receiving Party or its Representatives or other Person to whom the receiving Party discloses Confidential Information of the disclosing Party and that the disclosing Party may be entitled to equitable relief, including injunctive relief and specific performance, in the event of any breach of the provisions of this Section 15. To the fullest extent permitted by Applicable Law, such remedies shall not be deemed to be the exclusive remedies for a breach of this Section 15, but shall be in addition to all other remedies available at law or in equity.

16. Miscellaneous ProvisionsNoticesAll notices, communications and waivers under this Agreement shall be in writing and shall be (a) delivered in person or (b) mailed, postage prepaid, either by registered or certified mail, return receipt requested or (c) sent by reputable overnight express courier, addressed in each case to the addresses set forth below, or to any other address either of the parties to this Agreement shall designate in a written notice to the other Party:

DRAFT--Contact the Office of the City Clerk at (408)535-1260 or CityClerk@sanjoseca.gov for final document.

If to Provider:

Name: UTS SJ1 LLC
Street Address: 2211 Encinitas Blvd
City, State, Zip: Encinitas CA, 92024
Attention: Arun Sharma
Phone: (760) 436 8870
Fax: (760) 454 2887

If to Customer:

Name:
Street Address:
City, State, Zip:
Attention:
Phone:
Fax:

All notices sent pursuant to the terms of this Section 16.1 shall be deemed received (i) if personally delivered, then on the date of delivery, (ii) if sent by reputable overnight, express courier, then on the next Business Day immediately following the Day sent, or (iii) if sent by registered or certified mail, then on the earlier of the third (3rd) Business Day following the Day sent or when actually received.

16.2 AuthorityProvider Representations. Provider hereby represents and warrants that:

(a) It is a Delaware limited liability company duly organized, validly existing and in good standing under the laws of the state of its formation and has all requisite power and authority to enter into this Agreement, to perform its obligations hereunder and to consummate the transactions contemplated hereby;

(b) The execution and delivery of this Agreement and the performance of its obligations hereunder have been duly authorized by all necessary company action;

(c) This Agreement is a legal, valid and binding obligation of Provider enforceable against Provider in accordance with its terms, subject to the qualification, however, that the enforcement of the rights and remedies herein is subject to (i) bankruptcy and other similar laws of general application affecting rights and remedies of creditors and (ii) the application of general principles of equity (regardless of whether considered in a proceeding in equity or at law);

(d) To the best knowledge of Provider, as of the Effective Date , no governmental approval (other than any governmental approvals that have been previously obtained or disclosed in writing to Customer) is required in connection with the due authorization, execution and delivery of this Agreement by Provider or the performance by Provider of its obligations hereunder which Provider has reason to believe that it will be unable to obtain in due course on or before the date required for Provider to perform such obligations; and

(e) Neither the execution and delivery of this Agreement by Provider nor compliance by Provider with any of the terms and provisions hereof (i) conflicts with, breaches or contravenes the provisions of the *articles of formation* or *operating agreement* of Provider or any contractual obligation of Provider or (ii) results in a condition or event that constitutes (or that, upon notice or lapse of time or both, would constitute) an event of default under any material contractual obligation of Provider.

16.2.2 Customer Representations. Customer hereby represents and warrants that:

(a) Customer is a chartered city duly organized and validly existing under the Constitution and laws of the State of California.;

(b) it has the full right and authority to enter into, execute, deliver, and perform its obligations under the Agreement;

(c) it has taken all requisite corporate or other action to approve the execution, delivery, and performance of the Agreement;

(d) the Agreement constitutes its legal, valid and binding obligation enforceable against such Party in accordance with its terms, except as may be limited by applicable bankruptcy, insolvency, reorganization, moratorium, and other similar laws now or hereafter in effect relating to creditors' rights generally and may be subject to general principles of equity (regardless of whether such enforceability is considered in a proceeding in equity or at law) and public policy, to the exercise of judicial discretion in appropriate cases and to the limitations on legal remedies against cities in the State of California;

(e) there is no litigation, action, proceeding or investigation pending with service of process accomplished or notice provided that could reasonably be expected to adversely affect its ability to carry out the transactions contemplated herein; and

(f) its execution and performance of the Agreement and the transactions contemplated hereby do not constitute a breach of any term or provision of, or a default under, (i) any contract or agreement to which it is a party or by which it or any of its Affiliates or its or their property is bound, (ii) its organizational documents, or (iii) any Applicable Laws..

(g) Customer will not use any of the energy to be generated by the Provider for the purpose of heating a swimming pool.

16.3 Assignment16.3.1. Customer shall not assign this Agreement without the prior written consent of Provider and any such attempted assignment shall be void *ab initio*. Provider shall be permitted to assign this Agreement upon written notice thereof to Customer, including, without limitation, in connection with financing of the System or to an entity owned in whole or in part by an institutional investor.

16.3.2 Assignment by Provider for Financing Purposes. In the event Provider assigns its rights under this Agreement as security in connection with any financing transaction entered into by Provider, Provider may mortgage or grant a security interest in this Agreement and the System, and may assign this Agreement and the System to any mortgagees or holders of security interests, including their successors or assigns, (hereinafter collectively referred to as "Secured Parties"), provided such Secured Parties agree to be bound by the terms and provisions of this Agreement. Customer agrees to execute any consent or estoppel agreement related to such financing transaction as may reasonably be required by such Secured Parties. Customer agrees to notify Provider and any Secured Parties simultaneously of any default by Provider and to give Secured Parties the same right to cure any default as Provider or to remove any property of Provider located on the Premises, if such rights are requested. Any such notices to Secured Parties shall be sent to Secured Party at the address specified in writing to Customer by Provider or any Secured Parties. Failure by Customer to give Secured Party such notice shall not diminish Customer's rights against Provider, but shall preserve all rights of Secured Party to cure any default and to remove any property of Provider located on the Premises.

16.4 Successors and AssignsThe rights, powers and remedies of each Party shall inure to the benefit of such party and its successors and permitted assigns.

16.5 Entire AgreementThis Agreement (including all exhibits attached hereto) and the Lease represent the entire agreement between the parties to this Agreement with respect to the subject matter hereof and thereof and supersede all prior and contemporaneous oral and prior written agreements. In the event of any conflict between the provisions of this Agreement and the provisions of the Lease, the provisions of this Agreement shall govern and control.

16.6 Amendments to AgreementThis Agreement shall not be amended, modified or supplemented without the written agreement of Provider and Customer at the time of such amendment, modification or supplement.

16.7 Waivers; ApprovalsNo waiver of any provision of this Agreement shall be effective unless set forth in writing signed by the party making such waiver, and any such waiver shall be effective only to the extent it is set forth in such writing. Failure by a Party to insist upon full and prompt performance of any provision of this Agreement, or to take action in the event of any breach of any such provisions or upon the occurrence of any Provider Default or Customer Default, as applicable, shall not constitute a waiver of any rights of such Party, and, subject to the notice requirements of this Agreement, such Party may at any time after such failure exercise all rights and remedies available under this Agreement with respect to such Provider Default or Customer Default.

Receipt by a Party of any instrument or document shall not constitute or be deemed to be an approval of such instrument or document. Any approvals required under this Agreement must be in writing, signed by the Party whose approval is being sought.

16.8 Partial InvalidityIn the event that any provision of this Agreement is deemed to be invalid by reason of the operation of Applicable Law, Provider and Customer shall negotiate an equitable adjustment in the provisions of the same in order to effect, to the maximum extent permitted by law, the purpose of this Agreement (and in the event that Provider and Customer cannot agree then such provisions shall be severed from this Agreement) and the validity and enforceability of the remaining provisions, or portions or applications thereof, shall not be affected by such adjustment and shall remain in full force and effect.

16.9 Execution in CounterpartsThis Agreement may be executed in counterparts, and all said counterparts when taken together shall constitute one and the same Agreement.

16.10 Governing Law; Jurisdiction; ForumThis Agreement shall be governed by and construed in accordance with the internal laws of the State of California. Customer irrevocably agrees that any action, suit or proceeding by or among Provider and Customer may be brought in whichever of the Superior Courts of the State of California, Santa Clara County, or the Federal Court for the Northern District of California, has subject matter jurisdiction over the dispute and waives any objection that Customer may now or hereafter have regarding the choice of forum whether on personal jurisdiction, venue, *forum non conveniens* or on any other ground. Customer irrevocably consents to the service of process outside of the territorial jurisdiction of such courts by mailing copies thereof by registered or certified mail, postage prepaid, to Customer's address set forth herein with the same effect as if Customer were a resident of the State of California and had been lawfully served in such state. Nothing in this Agreement shall affect the right to service of process in any other manner permitted by law. Customer further agrees that final judgment against it in any action or proceeding shall be conclusive and may be enforced in any other jurisdiction within or outside the State of California by suit on the judgment, a certified or exemplified copy of which shall be conclusive evidence of the fact and the amount of such judgment.

16.11 No Third Party RightsThis Agreement is only for the benefit of the parties to this Agreement, their successors and permitted assigns and Persons expressly benefited by the indemnity provisions of this Agreement. No other Person (including, without limitation, tenants of the Site) shall be entitled to rely on any matter set forth in, or shall have any rights on account of the performance or non-performance by any Party of its obligations under, this Agreement.

16.12 Treatment of Additional AmountsThe parties hereto acknowledge and agree that any amounts payable by one Party to the other as a result of the payor's default (including without limitation Termination Value) shall constitute liquidated damages and not penalties. The parties further acknowledge that in each case (a) the amount of loss or damages likely to be incurred is incapable or is difficult to precisely estimate, (b) the amounts specified hereunder bear a reasonable proportion and are not plainly or grossly disproportionate to the probable loss likely to be

incurred by Customer or Provider as the case may be and (c) the parties are sophisticated business parties and have been represented by sophisticated and able legal and financial counsel and negotiated this Agreement at arm's length.

16.13 No AgencyThis Agreement is not intended, and shall not be construed, to create any association, joint venture, agency relationship or partnership between the Parties or to impose any such obligation or liability upon either Party. Neither Party shall have any right, power or authority to enter into any agreement or undertaking for, or act as or be an agent or representative of, or otherwise bind, the other Party.

16.14 No Public UtilityNothing contained in this Agreement shall be construed as an intent by Provider to dedicate its property to public use or subject itself to regulation as a "public utility" (as defined in the California Public Utilities Code or any other Applicable Law).

16.15 Sovereign ImmunityTo the extent permitted by Applicable Law, Purchaser hereby waives any defense of sovereign immunity that Purchaser might otherwise have in connection with any action taken by Provider to enforce its rights against Purchaser under this Agreement; provided however, that Purchaser does not waive the provisions and procedural requirements specified under the laws of the State of California, the San Jose Charter and the San Jose Municipal Code applicable to commencing an action against Purchaser, which requirements differ from those provisions and requirements applicable to individuals and nongovernmental entities.

16.16 No Recourse to AffiliatesThis Agreement is solely and exclusively between the Parties, and any obligations created herein on the part of either Party shall be the obligations solely of such Party. No Party shall have recourse to any parent, subsidiary, partner, member, Affiliate, lender, director, officer or employee of the other Party for performance or non-performance of any obligation hereunder, unless such obligations were assumed in writing by the Person against whom recourse is sought.

16.17 Cooperation with FinancingCustomer acknowledges that Provider may be financing the Fuel Cell Services and the Systems and Customer agrees that it shall reasonably cooperate with Provider and its financing parties in connection with such financing, including (a) the furnishing of such information, (b) the giving of such certificates, and (c) providing such opinions of counsel and other matters as Provider and its financing parties may reasonably request; provided, that the foregoing undertaking shall not obligate Customer to materially change any rights or benefits, or materially increase any burdens, liabilities or obligations of Customer, under this Agreement (except for providing notices and additional cure periods to the financing parties with respect to Events of Defaults with respect to Provider as a financing party may reasonably request).

16.18 SetoffExcept as otherwise set forth herein, each Party reserves to itself all rights, set-offs, counterclaims and other remedies and/or defenses to which it is or may be entitled, arising from or out of this Agreement or arising out of any other contractual arrangements between

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the Parties. All outstanding obligations to make and rights to receive, payment under this Agreement may be offset against each other.

16.19 Service ContractThe Parties intend this Agreement to be a "service contract" within the meaning of Section 7701(e)(3) of the Internal Revenue Code of 1986.

16.20 Gifts.

Provider is familiar with Customer's prohibition against the acceptance of any gift by a City officer or designated employee, which prohibition is found in Chapter 12.08 of the San Jose Municipal Code. Provider agrees not to offer any City officer or designated employee any gift prohibited by said Chapter. The offer or giving of any gift prohibited by Chapter 12.08 shall constitute a material breach of this Agreement by Seller. In addition to any other remedies Customer may have in law or equity, Buyer may terminate this Agreement for such breach as provided in this Agreement

16.21 Disqualification of Former Employees.

Provider is familiar with the provisions relating to the disqualification of former officers and employees of City in matters which are connected with former duties or official responsibilities as set forth in Chapter 12.10 of the San Jose Municipal Code ("Revolving Door Ordinance"). Provider shall not utilize either directly or indirectly any officer, employee, or agent of City to perform services under this Agreement, if in the performance of such services, the officer, employee, or agent would be in violation of the Revolving Door Ordinance.

16.22 Nondiscrimination and Non Preferential Treatment.

(a) Provider shall not discriminate against or grant preferential treatment to any person on the basis of race, sex, color, age, religion, sexual orientation, disability, ethnicity or national origin. This provision is applicable to recruiting, hiring, demotion, layoff, termination, compensation, fringe benefits, advancement, training, apprenticeship and other terms, conditions, or privileges of employment, subcontracting and purchasing. Nothing herein shall be interpreted as precluding any reasonable accommodation provided to any person with a disability;

(b) If directed by the Compliance Officer of City, Provider shall file, and cause any subcontractor to file, compliance reports with the Compliance Officer. Compliance reports shall be in the form and filed at such times as may be designated by the Compliance Officer. Compliance reports shall contain such information and be supported by such data or records as may be requested by the Compliance Officer to determine whether Provider or its subcontractor is complying with the nondiscrimination and no preference provisions of this Agreement and Chapter 4.08 of the Municipal Code;

(c) If the Compliance Officer determines that Provider has not complied with the nondiscrimination or no preferential treatment provisions of this Agreement, the Provider may

terminate or suspend this Agreement, in whole or in part. Failure to comply with these provisions may also subject Provider and/or its subcontractor(s) to debarment proceedings pursuant to provisions of the San Jose Municipal Code. Failure to comply with these provisions is a violation of Chapter 4.08 of the San Jose Municipal Code and is a misdemeanor;

(d) Provider shall include provisions 1 through 3, inclusive, in each subcontract entered into in furtherance of this Agreement so that such provisions are binding upon each of its subcontractors; and

(e) The nondiscrimination provisions of this Agreement may be waived by the Compliance Officer, if the Compliance Officer determines that the Provider has its own nondiscrimination requirements or is bound in the performance of this Agreement by the nondiscrimination requirements of another governmental agency, and the nondiscrimination provisions of the Provider or other governmental agency are substantially the same as those imposed by the City.

16.23 Addition of Capacity. Customer reserves the option of contracting with Provider to provide up to an additional 1.4MW of generation capacity on substantially similar terms and conditions as are stated in this Agreement.

17. EstoppelEither Party hereto, without charge, at any time and from time to time, within ten (10) Business Days after receipt of a written request by the other party hereto, shall deliver a written instrument, duly executed, certifying to such requesting party, or any other person, firm or corporation specified by such requesting party:

(a) That this Agreement is unmodified and in full force and effect, or if there has been any modification, that the same is in full force and effect as so modified, and identifying any such modification;

(b) Whether or not to the knowledge of any such party there are then existing any offsets or defenses in favor of such party against enforcement of any of the terms, covenants and conditions of this Agreement and, if so, specifying the same and also whether or not to the knowledge of such party the other party has observed and performed all of the terms, covenants and conditions on its part to be observed and performed, and if not, specifying the same; and

(c) Such other information as may be reasonably requested by a Party heretoAny written instrument given hereunder may be relied upon by the recipient of such instrument, except to the extent the recipient has actual knowledge of facts contained in the certificate.

IN WITNESS WHEREOF, the parties hereto have duly executed and delivered this Agreement as of the date set forth above.

[CUSTOMER]: UTS BIOENERGY SJ-1, LLC:

DRAFT--Contact the Office of the City Clerk at (408)535-1260 or CityClerk@sanjoseca.gov for final document.

By: _____ By: _____

Name: _____ Name: _____

Title: _____ Title: _____

DRAFT--Contact the Office of the City Clerk at (408)535-1260 or CityClerk@sanjoseca.gov for final document.

EXHIBIT A
DESCRIPTION OF SITE

(To be developed by City of San Jose)

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EXHIBIT B

SPECIAL CONSTRUCTION PROVISIONS

Provider and Customer agree that the requirements and specifications set forth in Sections 1.01, 1.02 and 1.03 of this Exhibit B are for guidance only and the Seller may design and modify the system and specifications other than gross Power Capacity, to optimize system cost and performance and to be in compliance with codes and regulations.

1. FUEL CELL TECHNICAL SPECIFICATION

Provider shall construct the System in accordance with the following specifications.

1.01 SYSTEM DESCRIPTION

A. Scope of work includes but is not limited to designing, specifying, furnishing, installing, testing, commissioning and maintaining a Fuel Cell System (Fuel Cell System). Provide all required materials and incidentals for complete and ready-to-use equipment.

1.02 SYSTEM REQUIREMENTS

A. The Fuel Cell System and related materials shall be designed after a thorough site investigation and meetings with the City.

1.03 CRITERIA

A. The fuel cell system and its installation shall adhere to the appropriate technical codes for performance and safety of the applicable standards organization including but not limited to the following:

- American Gas Association
- The National Fire Protection Association (NFPA)
- Underwriters Laboratories (UL)
- American Society of Mechanical Engineers (ASME)
- American National Standards Institute (ANSI)

B. The Fuel Cell System shall adhere to all applicable portions of the following codes:

- California Building Code 2007
- CSA-FC1 Standard for Fuel Cell Power Plants

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- UL 1741 Standard for Power Conversion Systems
- IEEE 1547
- NFPA 70 (National Electric Code)
- NFPA 853 Standard for Installation of Fuel Cell Power Plants
- ASME piping and vessel codes, as applicable per process conditions
- OSHA General Industry Standards 29 CFR part 1910
- Any other applicable local, state or national codes

C. 2007 California Electrical Code

D. American Society Testing Materials

E. ANSI/IEEE – American National Standard Institute/Institute of Electrical and Electronic Engineers

F. National Electrical Testing Association

G. ANSI C37 Circuit Breakers, Switchgear, Relays, Substations and Fuses

H. PPA provider to include methane gas leak detection and fire prevention system as part of the FCS per city's fire department requirements

1.04 COMPLIANCE VERIFICATION AND PERMITS

A. Contractor shall be responsible for making sure all permits required to build and operate the Fuel Cell System are acquired. If there are permits not yet acquired then the Contractor shall be responsible for acquiring them.

Building construction permit is not required for this project however; WPCP's internal staff shall inspect each part of the construction.

1.05 SUBMITTALS

A. Submittals during Design

1. Drawings: Submit the following drawings at the completion of concept, preliminary and final design and all other drawings necessary to construct the project:

   a. Equipment lay-out plan showing the lay-out of the entire system with reference to the Plant and the immediate area surrounding the system. It shall also show the lay-out of the different equipment within the system and the different interconnection and access points.

b. Electrical plans indicating all equipment, devices, electrical conduit runs and wiring diagrams. Included also will be electrical panels, its elevations and internal wiring.

c. Electrical single line diagram indicating existing and new electrical connections and equipment. Including the interconnection of the fuel cell system to the existing plant distribution system.

d. Mechanical plans indicating all equipment, piping and valves. Includes housing for equipment and equipment detail.

e. Process and instrumentation diagram indicating process flow and instrumentation to control the process. It should show the entire process from the beginning, from the fuel feed and other necessary input, to the end, output of electric power, thermal energy and all by-products including any waste material.

f. Structural plans showing dimension and details of structural members including the foundation.

1.06 Submittals During Construction

A. Provide a complete submittal package for review and approval prior to ordering materials, fabrication or installation. Shop drawings shall comply with the respective criteria. Provide complete submittal data for all components proposed to be utilized. On data submittal sheets where more than one product is described, clearly annotate which product(s) are to be supplied. Incomplete submittals will be returned disapproved. Contractor is encouraged to submit indicated submittal during the design phase.

B. Submit the following documents

1. Shop Drawings
2. Product, Equipment Data
3. Manufacturer's Instructions
4. Manufacturer's Field Reports
5. Operation and Maintenance Data
6. Acceptance Testing procedures for Furnished and Installed Equipment
7. Certified Test Reports

DESIGN CRITERIA

1.07 GENERAL DESIGN CRITERIA

A. The Fuel Cell System design shall be of stationary power plant utilizing the Molten Carbonate Type, Phosphoric Acid Type or other proven technology.

B. Contractor shall provide automatic switchover of fuel from DG to NG and vice versa as and when there is a problem with the quality or availability of DG. Each such switchover shall be automatically logged for future reference. This log should be accessible to plant SCADA system and should be capable of showing the exact reason for switchover, quantity of natural gas consumption between consecutive switchovers.

C. Both the DG and NG flow metering shall comply with PG & E utility grade standards.

   Fuel Cell System shall have both local and remote emergency gas shut-off control. All mounting hardware and ductworks shall be stainless steel.

D. The Fuel Cell System will be outdoors and shall be exposed to corrosive environment of wastewater treatment plant. All the components should be rated for an outdoor and generally corrosive environment. PPA provider should use material customarily suited for the plant environment.

E. The Fuel Cell System shall be fed digester gas. The Fuel Cell System shall include fuel conditioning and cleaning system.

F. The Fuel Cell System shall have an electrical efficiency of greater than 40 % at rated electrical output

G. Noise level shall be a maximum of 72 dB at 10 feet

H. The Fuel Cell System shall have the maximum emissions:

   (Nitrogen Oxides) NOx – 0.02 lb/MWh

   (Sulfur Oxides) SOx – 0.001 lb/MWh

   (Carbon Monoxide) CO – 0.05 lb/MWh

   Contractor to supply guaranteed limit on each emission

I. All wires and cables shall be labeled at their termination.

1.08 ELECTRICAL DESIGN CRITERIA

A. The Fuel Cell System shall be designed to be connected to the existing electrical distribution system of the San Jose/Santa Clara Water Pollution Control Plant

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(WPCP) to supply electrical power as part of the base load. Please refer to site plan for location of the connection point and transformer.

B. The Fuel Cell System shall include electrical interface to safely connect the Fuel Cell System to the WPCP electrical distribution system. Electrical interface may include, but not limited to, transformers, inverters, phase synchronizing equipment, metering and generator output breaker. The Contractor shall install an electrical terminal panel where City staff can properly terminate the conductors to connect the fuel cell electrical output at 4160 volt to the WPCP electrical distribution system.

C. City needs a route to reach high voltage terminal at the switchgear. The scope of the City to provide underground raceway ends at the conduit stub coming out of the concrete slab and the PPA provider will be responsible for additional raceways between the stub-out and the high voltage terminal at the switchgear. The City will install all the required underground conduits, including the ground grid around the complete FCE site including switchgear and the gas treatment skid.

D. The Fuel Cell System will have a three-phase output voltage of 4160VAC at 60 Hz.

E. The power rating of the Fuel Cell System shall be:

1.4 Megawatts

F. The Fuel Cell System should be able to supply at least 90% of its rated electrical capacity continuously.

1.09 INSTRUMENTATION AND CONTROL DESIGN CRITERIA

A. The Fuel Cell System's shall have a standalone control system.

B. The Fuel Cell System's instrumentation and control system shall be connected to the distributed control system (DCS) of the San Jose/Santa Clara Water Pollution Control Plant (WPCP).

C. The Fuel Cell System shall include an instrumentation and control interface panel. The instrumentation and control interface panel will be designed such that City staff will be able to properly terminate the conductors and/or cables to connect the fuel cell instrumentation and control system to WPCP's DCS.

D. The Contractor shall mark position of a pull box/manhole in the Fuel Cell Slab layout for plant DCS communication conduits. The manhole or pullbox can be within the vicinity of the Fuel Cell System if not directly on the Fuel Cell Slab. The Contractor shall also install conduits from the instrumentation and control interface panel to this manhole or pullbox.

E. As a minimum, the following parameters shall be available for the DCS:

1. Real power in Kilowatts
2. All the line-to-line voltage

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3. Currents for each phase
4. Reactive power in KVAR
5. Apparent power in KVA
6. Power factor
7. Frequency in Hertz
8. Thermal energy temperature in Fahrenheit for fuel
9. Thermal energy rate in mmBTU per hour for fuel
10. Fuel flow for both natural gas and digester gas in cubic feet per second
11. Thermal energy temperature in Fahrenheit for water
12. Thermal energy rate in mmBTU per hour for water
13. Water flow in cubic feet per second

Additionally, the fuel clean-up system shall include parameters to be monitored by the DCU to indicate how effective the fuel clean-up system is operating. An example of a parameter is the hydrogen sulfide content of a scrubber solution.

F. Modbus protocol shall be used to communicate with the WPCP's DCS.

G. Any internal control or measured parameter used in the Fuel Cell System shall be available for the DCS through Modbus

H. Contractor shall also add parameters that are necessary for the operation of the Fuel Cell System not mentioned above.

I. Emergency shutdown capabilities shall be incorporated into the Modbus protocol.

J. Contractor shall install an energy meter that conforms to PG&E requirements and acceptable to the City to measure the amount of electrical energy that the Fuel Cell System is supplying to the WPCP's electrical distribution system.

1.10 CIVIL AND STRUCTURAL DESIGN CRITERIA

A. The Contractor shall provide the equipment details for City to design the platform for the Fuel Cell System. The platform shall contain all the components and equipment of the Fuel Cell System. The footprint of the platform shall fit into the space provided as indicated on the drawing. The platform shall also function as a foundation to hold the various components and equipment down. The City will construct the platform per contractors design. The height any component on the platform shall not exceed 30ft.

B. The City will perform Seismic Anchorage Calculations for the Fuel Cell System to meet Seismic Zone 4 requirements. Contractor will be responsible for the installation.

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1.11 MECHANICAL DESIGN CRITERIA

A. The Fuel Cell System shall produce thermal energy in the form of hot water with an outgoing temperature adjustable from 160˚F to180˚F and a heat rate of 1.8 mmBTU per hour. The Fuel Cell System shall be able to dissipate thermal energy that is not being utilized. The Contractor shall provide heat exchanger if needed for the hot water loop.

B. The Contractor shall provide connection points for the City staff to connect water pipes both for supplying water to the Fuel Cell System and to supply thermal energy in the form of hot water.

C. The Fuel Cell System shall include any gas compression system to increase the pressure of the digester gas if the gas supply pressure falls below the pressure suitable for the Fuel Cell System.

D. City will provide potable water at 60 psi.

1.12 GAS SCRUBBING KIT

Contractor shall design the interconnection between the Gas Scrubbing Kit and the Fuel Cell System foundation showing all electrical conduits and mechanical piping. City will install the conduits and the pipes per contractor's design.

2. WAGE REQUIREMENTS AND INFORMATION

Pursuant to City of San Jose Prevailing Wage and Living Wage Policies, Provider and any subcontractor shall be obligated to pay not less than the prevailing wage or living wage in accordance with the requirements of the City's Labor Compliance Addendum and the Wage Determination as indicated in Exhibit B-1 to the Addendum.

3. PAYMENT AND PERFORMANCE BONDS

Provider shall provide Payment and Performance Bonds in substantial conformity with Exhibits B-2 and B-3

LABOR COMPLIANCE ADDENDUM

AGREEMENT TITLE:	
CONTRACTOR Name and Address:	

By executing this Addendum, Contractor acknowledges and agrees that the work performed pursuant to the above referenced Agreement is subject to all applicable provisions.

Payment of Minimum Compensation to Employees. Contractor shall be obligated to pay not less than the General Prevailing Wage Rate and/or Living Wage Rate as indicated in the attached Exhibit(s) titled **Work Classification and/or Living Wage Determination**.

A. Prevailing Wage Requirements. California Labor Code and/ or Resolutions of the San Jose City Council require the payment of not less than the general prevailing rate of per diem wages and rates for holiday and overtime and adherence to all labor standards and regulations. The General Prevailing Wage Rates may be adjusted throughout the term of this Agreement. Notwithstanding any other provision of this Agreement, Contractor shall not be entitled to any adjustment in compensation rates in the event there are adjustments to the General Prevailing Wage Rates.

B. Living Wage Requirements. Any person employed by Contractor or subcontractor or City financial recipient or any sub recipient whose compensation is attributable to the City's financial assistance, who meets the following requirements is considered a covered employee. The employee: 1) is not a person who provides volunteer services, that are uncompensated except for reimbursement of expenses such as meals, parking or transportation; 2) spends at least half of his or her time on work for the City [4 hours a day or 20 hours a week]; 3) is at least eighteen (18) years of age; and 4) is not in training for the period of training specified under training standards approved by the City.

C. Reports. Contractor shall file a completed and executed copy of this Addendum with the Finance Department/Purchasing Division. Upon award Finance Department/Purchasing Division shall provide the contractor with compliance documents to be completed and returned (with supporting documentation) to the Office of Equality Assurance. **These documents must be returned within 10 days of receipt**. Contractor shall not perform on site work on this contract until labor compliance documents are filed. Contractor shall also report additional information, including certified payrolls, as requested by Director of Equality Assurance to assure adherence to the Policy.

D. Coexistence with Any Other Employee Rights. These provisions shall not be construed to limit an employee's ability to bring any legal action for violation of any rights of the employee.

E. Audit Rights. All records or documents required to be kept pursuant to this Agreement to verify compliance with the Wage Requirement shall be made available for audit at no cost to City, at any time during regular business hours, upon written request by the City Attorney, City Auditor, City Manager, or a designated representative of any of these officers. Copies of such records or documents shall be provided to City for audit at City Hall when it is practical to do so. Otherwise, unless an alternative is mutually agreed upon, the records or documents shall be available at Contractor's address indicated for receipt of notices in this Contract.

F. Enforcement.

1. **General.** Contractor acknowledges it has read and understands that, pursuant to the terms and conditions of this Agreement, it is required to comply with the Wage Requirement and to submit certain documentation to the City establishing its compliance with such requirement. ("Documentation Provision.") Contractor further acknowledges the City has determined that the Wage Requirement promotes each of the following (collectively "Goals"):
   a. It protects City job opportunities and stimulates the City's economy by reducing the incentive to recruit and pay a substandard wage to labor from distant, cheap-labor areas.
   b. It benefits the public through the superior efficiency of well-paid employees, whereas the payment of inadequate compensation tends to negatively affect the quality of services to the City by fostering high turnover and instability in the workplace.
   c. Paying workers a wage that enables them not to live in poverty is beneficial to the health and welfare of all citizens of San Jose because it increases the ability of such workers to attain sustenance, decreases the amount of poverty and reduces the amount of taxpayer funded social services in San Jose.
   d. It increases competition by promoting a more level playing field among contractors with regard to the wages paid to workers.

2. Remedies for Contractor's Breach of Prevailing Wage/Living Wage Provisions.

a. WITHHOLDING OF PAYMENT: Contractor agrees that the Documentation Provision is critical to the City's ability to monitor Contractor's compliance with the Wage Requirement and to ultimately achieve the Goals. Contractor further agrees its breach of the Documentation Provision results in the need for additional enforcement action to verify compliance with the Wage Requirement. In light of the critical importance of the Documentation Provision, the City and Contractor agree that Contractor's compliance with this Provision, as well as the Wage Requirement, is an express condition of City's obligation to make each payment due to the Contractor pursuant to this Agreement. **THE CITY IS NOT OBLIGATED TO MAKE ANY PAYMENT DUE THE CONTRACTOR UNTIL CONTRACTOR HAS PERFORMED ALL OF ITS OBLIGATIONS UNDER THESE PROVISIONS. THIS PROVISION MEANS THAT CITY CAN WITHOLD ALL OR PART OF A PAYMENT TO CONTRACTOR UNTIL ALL REQUIRED DOCUMENTATION IS SUBMITTED.** Any payment by the City despite Contractor's failure to fully perform its obligations under these provisions shall not be deemed to be a waiver of any other term or condition contained in this Agreement or a waiver of the right to

withhold payment for any subsequent breach of the Wage Requirement or the Documentation Provision.

b. RESTITUTION: Require the employer to pay any amounts underpaid in violation of the required payments and City's administrative costs and liquidated damages and, in the case of financial assistance, to refund any sums disbursed by the City.

c. SUSPENSION OR TERMINATION: Suspend and/or terminate Agreement for cause;

d. DEBARMENT: Debar Contractor or subcontractor from future City contracts and/or deem the recipient ineligible for future financial assistance.

e. LIQUIDATED DAMAGES FOR BREACH OF WAGE PROVISION: Contractor agrees its breach of the Wage Requirement would cause the City damage by undermining the Goals, and City's damage would not be remedied by Contractor's payment of restitution to the workers who were paid a substandard wage. Contractor further agrees that such damage would increase the greater the number of employees not paid the applicable prevailing wage and the longer the amount of time over which such wages were not paid. The City and Contractor mutually agree that making a precise determination of the amount of City's damages as a result of Contractor's breach of the Wage Requirement would be impracticable and/or extremely difficult**. THEREFORE, THE PARTIES AGREE THAT, IN THE EVENT OF SUCH A BREACH, CONTRACTOR SHALL PAY TO THE CITY AS LIQUIDATED DAMAGES THE SUM OF THREE (3) TIMES THE DIFFERENCE BETWEEN THE ACTUAL AMOUNT OF WAGES PAID AND THE AMOUNT OF WAGES THAT SHOULD HAVE BEEN PAID.**

City	Contractor
By_____	By_____
Name: Mark Giovannetti	Name:
Title: Purchasing Officer	Title:
Date:_____	Date:_____

DRAFT--Contact the Office of the City Clerk at (408)535-1260 or CityClerk@sanjoseca.gov for final document.

ATTACHMENT I
Exhibit 1

City of San José Wage

CONTRACT SCOPE: Fuel Cell Installation, Operation & Maintenance

Contracts governed by both the City of San Jose's Living Wage Policy (Resolution No. 68900) and its Prevailing Wage Policy (Resolution No. 61144) are subject to the Policy with the higher wage requirements.

PREVAILING WAGE

Work	DIR Craft Classification & Page Number
Electrical	Electrician: Inside Wireman, Technician [Page 145]
Plumbing	Plumber: Plumber, Steamfitter, Refrigeration (HVAC) [Page 145a]
Sheet Metal	Sheet Metal Worker [Page 145a]
Welding	Iron Worker [Page 2]

For work not expressly identified above, please refer to the Department of Industrial Relations website referenced on Page 2 of this Attachment of the RFP. Conform the work to the appropriate craft classification listed in the General Prevailing Wage Determination made by the Director of Industrial Relations. The above classifications have been provided as the majority of the work during construction, operations and maintenance would fall under these classifications.

Instructions to Obtain Prevailing Wage Determination

A copy of the current General Prevailing Wage Determination made by the Director of Industrial Relations may be obtained from the Office of Equality Assurance at:

City of San Jose – Public Works
Equality Assurance
200 E. Santa Clara St., 5th Floor Tower
San Jose, CA 95113-1905
Phone: 408.535.8430 Fax: 408.292.6270

For Internet access to current wage rates and benefit information, you may contact the California Department of Industrial Relations web site at **http://www.dir.ca.gov/.** Click on **Statistics & Research**. Scroll down to Current Prevailing Wage Determinations and click on the corresponding **General Prevailing Wage Determinations Menu (Journeyman)**. Scroll down and follow the directions until you locate the trade applicable to your contract. Prevailing wages for City of San Jose contracts will be found under:

- Step One **Statewide**,
- Step Two (A) **Northern California**, or
- Step Four for **Santa Clara County**

Effective Dates of Determination and of Rates within Determination

Contractors are advised that rates determined by the Department of Industrial Relations are subject to change during the term of this contract as described below.

Effective date of determination. All determinations issued by the Director of the Department of Industrial Relations will be effective ten (10) days after issuance. Determinations issued by the Director will show an issue date and will ordinarily show an expiration date. All determinations will remain in effect until their expiration date or until modified, corrected, rescinded or superseded by the Director. Contractors are advised to note the expiration date on the prevailing wage classification identified for this solicitation and the asterisk (*) as explained in the paragraph below.

Meaning of single and double asterisks. Prevailing wage determinations with a single asterisk (*) after the expiration date (which are in effect on the date of advertisement for bids) remain in effect for the life of the project. Prevailing Wage determinations with double asterisks (**) after the expiration date indicate that the basic hourly wage rate, overtime and holiday pay rates, and employer payment to be paid for work performed *after* this date have been predetermined. If work is to be extended past the rate expiration date, the new rate must be paid and should be incorporated in contracts entered into now. Contact the Division of Labor Statistics and Research for specific rates (415) 703-4774.

All determinations that do not have the double asterisks (**) after the expiration date remain in effect for the life of the contract.

LABOR COMPLIANCE

CONTRACTOR NAME:_____

CONTRACT:_____

In the chart below, list the name, prevailing wage or living wage classification(s) to be used, rate of pay and hire date for each employee expected to work on the above contract. See example below.

EMPLOYEE NAME	CRAFT/TRADE CLASSIFICATION	BASIC HOURLY RATE OF PAY (On City of San Jose Contract)	DATE OF HIRE Indenture Date If Apprentice)
Example: Bob Jones	***Recycle Driver***	***$24.28***	***6/1/2002***

Questions regarding classifications allowed on San Jose projects should be directed to the Office of Equality Assurance at 408-535-8430.

ATTACHMENT I
Exhibit 3

LABOR COMPLIANCE

CONTRACTOR NAME:_____

CONTRACT:_____

I certify under penalty of perjury that fringe benefits are paid to the approved plans, funds, or programs as listed below:

Classification	Fringe Benefit Hourly Amount	Name of the Plan or Fund (Attach Premium Transmittal)
1.	Vacation $	
Documentation of Plan contribution must be returned with this statement Please attach a copy of your most recent transmission into each medical, pension, or profit sharing plan account indicating worker name and amount of contribution.	Health & Welfare $	
	Pension $	
	Apprentice $	
	Other (specify) $	
2.	Vacation $	
	Health & Welfare $	
	Pension $	
	Apprentice $	
	Other (specify) $	
3.	Vacation $	
	Health & Welfare $	
	Pension $	
	Apprentice $	
	Other (specify) $	

All (or some) fringes are paid in cash by adding the amount to the employee's basic hourly rate.

_____
Company Name (Please Print) **Name and Title (Please Print)**

_____ _____
Date **Signature**

DRAFT--Contact the Office of the City Clerk at (408)535-1260 or CityClerk@sanjoseca.gov for final document.

Bond Number: _____

ATTACHMENT B-2
Payment Bond Form

KNOW ALL PERSONS BY THESE PRESENTS:

THAT WHEREAS, the CITY OF SAN JOSE, a municipal corporation of the State of California, (hereinafter designated as "Public Entity"), is about to enter into a certain contract with **_____{Contractor's Name}**, a **_____{Type of Company i.e. California Corporation}**, as Principal, namely, "Contract for:**_____{Name of Project}**", for the work hereinafter briefly described, to wit: Specifications for **_____{Name Of Solicitation And Rfq#}** and more fully described in and required by said contract, the award of which said Contract was made to said Principal by the City of San Jose on **_____{Date Of Notice Of Award}**.

WHEREAS, said Principal is required by Chapter 5 (commencing at Section 3225) and Chapter 7 (commencing at Section 3247), Title 15, Part 4, Division 3 of the California Civil Code to furnish a bond in connection with said contract.

NOW, THEREFORE, we, the Principal and _____ incorporated under the laws of the State of _____, and authorized to execute bonds and undertakings as sole surety, as Surety, are held and firmly bound unto the Public Entity in the penal sum of **_____ {AMOUNT IN WORDS} and __/100 DOLLARS ($)**, lawful money of the United States of America for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

THE CONDITION OF THIS OBLIGATION IS SUCH that if said Principal, subcontractors, heirs, executors, administrators, successors, or assigns, shall fail to pay any of the persons named in Section 3181 of the California Civil Code, or amounts due under the Unemployment Insurance Code with respect to any work or labor performed or materials supplied by any such claimant, which said work, labor or materials are covered by the said contract and any amendments, changes, change orders, additions, alterations, or modifications thereof, or for any amounts required to be deducted, withheld, and paid over to the Employment Development Department from the wages of employees of the Principal and their Subcontractors, pursuant to Section 18806 of the Revenue and Taxation Code, with respect to such work and labor, the Surety will pay for the same, in an amount not exceeding the sum hereinabove specified, and also, in case suit is brought upon this bond, a reasonable attorney's fee to be fixed by the court.

This bond shall insure to the benefit of any of the persons named in Section 3181 of the California Civil Code, so as to give a right of action to such persons or their assigns in any suit brought upon this bond.

It is further stipulated and agreed that the Surety on this bond shall not be exonerated or released from the obligation of this bond by any change, extension of time for performance, addition, alteration or modification in, to, or of any contract, plans, specifications, or agreement pertaining or relating to any scheme or work of improvement hereinabove described or pertaining or relating to the furnishing of labor, materials, or equipment therefore, nor by any change or modification of any terms of payment or extension of the time for any payment pertaining or relating to any scheme or work of improvement hereinabove described, nor by any rescission or attempted rescission of the contract, agreement or bond, nor by any conditions precedent or subsequent in the bond attempting to limit the right of recovery of claimants otherwise entitled to recover under any such contract or agreement or under the bond, nor by any fraud practiced by any person other than the claimant seeking to recover on the bond and that this bond be construed most strongly against the Surety and in favor of all persons for whose benefit such bond is given, and under no circumstances shall Surety be released from liability to those for whose benefit such bond has been given, by reason of any breach of contract between the owner or Public Entity and original Contractor or on the part of any obligee named in such bond, but the sole conditions of recovery shall be that claimant is a person described in Section 3110 or 3112 of the California Civil Code, and has not been paid the full amount of their claim and that Surety does hereby waive notice of any such change, extension of time, addition, alteration, modification, rescission or attempted rescission, herein mentioned.

It is further stipulated and agreed that no final settlement between the Public Entity and the Contractor with reference to the work, shall abridge the right of any beneficiary hereunder whose claims may be unsatisfied.

This bond is executed and delivered to comply with requirements of the City of San Jose, and to comply with the provisions of Title 15, Chapters 5 and 7 of Part 4, Division 3 of the Civil Code of the State of California.

SIGNED AND SEALED this _____ day of_____, 20___.

PRINCIPAL

SURETY

_____
Legal Company Name

By: _____

Title: _____

By:_____

Title:_____

By: _____

Title: _____

Address _____

_____

_____

Telephone_____

(Affix Corporate Seals)

(Attach Acknowledgments of both Principal and Surety signatures)

Approved by the City Attorney of the City of San Jose on the _____ day of

_____20____.

By: _____

DRAFT--Contact the Office of the City Clerk at (408)535-1260 or CityClerk@sanjoseca.gov for final document.

Deputy

DRAFT--Contact the Office of the City Clerk at (408)535-1260 or CityClerk@sanjoseca.gov for final document.

ATTACHMENT B-3
Performance Bond Form

_____ **SERVICES FOR THE CITY OF SAN JOSE, CALIFORNIA**

KNOW ALL MEN BY THESE PRESENTS: that

(here insert full name and address or legal title of franchisee)

as Principal, hereinafter called Contractor, and, _____
(Name of Insurer)
as Surety, hereinafter called Surety, are held firmly bound unto the CITY OF SAN JOSE, CALIFORNIA as Obligee, hereinafter called the City, in the amount of not less than (amount
to be inserted equal to 25% of the FRANCHISEE's estimated annual processing fee) for the payment whereof Contractor and Surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, Franchisee has by written agreement dated_____, 20__, entered into an
Agreement with the City for providing (to be inserted) Services in accordance with RFP specifications and Agreement of the CITY OF SAN JOSE, CALIFORNIA, which Agreement is by
reference made a part hereof, and is hereinafter referred to as the Agreement.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION is such that, if Contractor shall
promptly and faithfully perform said Agreement, then this obligation shall be null and void; otherwise it shall remain in full force and effect.

The Surety hereby waives notice of any alteration or extension of time made by the City.

Whenever Franchisee shall be, and declared by the City to be in default under the Agreement,
the City having performed the City's obligations thereunder, the Surety may promptly remedy
the default, or shall promptly perform one of the following:

1. Complete the Agreement in accordance with its terms and conditions.

2. Obtain a bid or bids for completing the Agreement in accordance with the terms and conditions, and upon determination by the Surety of the lowest responsible bidder, or if the City elects, upon determination by the City and the Surety jointly obtain a bid or bids for

completing the Agreement in accordance with the terms and conditions, and upon determination by the Surety of the lowest responsible bidder, or if the City elects, upon determination by the city and the Surety jointly of the lowest responsible bidder, arrange for an agreement between such bidder and the City, and make available as work progresses (even thought there should be a default or a succession of defaults under the Agreement or Agreement of completion arranged under this paragraph) sufficient funds to pay the cost of completion less the balance of the Agreement price; but not exceeding, including costs and damages for which the Surety may be liable hereunder, the amount set forth in the first paragraph hereof. The term “balance of the Agreement price,” as used in this paragraph, shall mean the total amount payable by the City to Franchisee under the Agreement and any amendments thereto, less the amount properly paid by the City to Franchisee.

Any suit under this bond must be instituted before the expiration date of the Agreement or if extended for an additional term by the City, the expiration of the extended term.

No right of action shall accrue on this bond to or for the use of any person or corporation other than the City named herein or the executor, administrator or successors of the City of San José, California.

Signed and sealed this ____ day of _____, 20__.

(Principal) (Seal)

_____

(Witness) (Title)

Surety (Seal)

(Name of Insurer)

(Witness) By:

_____

(Attorney-in-Fact)

DRAFT--Contact the Office of the City Clerk at (408)535-1260 or CityClerk@sanjoseca.gov for final document.

EXHIBIT C
DESCRIPTION OF SYSTEMS; SPECIFICATIONS; MAINTENANCE

[To be developed]
Description of Systems:
(subject to final design and construction)

Specifications:

Maintenance:

DRAFT--Contact the Office of the City Clerk at (408)535-1260 or CityClerk@sanjoseca.gov for final document.

EXHIBIT D
GAS SUPPLY SPECIFICATIONS

Acceptable Digester Gas will meet the following criteria as defined in the table below. These criteria may be modified as set forth in Section 4.7 of the Agreement.

Nitrogen	*
Methane	More than 60% percent by volume
Carbon Dioxide	Less than 38% percent by volume
Hydrogen Sulfide	Less than 370 parts per million by volume
Siloxanes (Total, all species)	*
VOCs	*
Moisture	*
Gas Pressure at Inlet	More than 40 psig

* To be determined as set forth in Section 4.7 of the Agreement.

DRAFT--Contact the Office of the City Clerk at (408)535-1260 or CityClerk@sanjoseca.gov for final document.

Exhibit E

Heat Transfer Design Conditions

1. Fuel Cell running at full load
2. Exhaust flow rate SCFM 4067
3. Exhaust entering temperature 650 F
4. Exhaust leaving temperature 270 F
5. Pressure drop "WC" Maximum -- 0,58
6. Water flow rate 190 GPM
7. Water entering temperature 140 F
8. Liquid leaving temperature 160.2 F
9. Pressure drop psig -- 0.42
10. PH of Water 7

DRAFT--Contact the Office of the City Clerk at (408)535-1260 or CityClerk@sanjoseca.gov for final document.

EXHIBIT F

Fuel Cell System SCOPE OF SERVICES

1. Contractor Responsibilities:

1.1 General Scope: Contractor shall; (a) provide all materials and equipment including the digester gas clean-up skid, to condition the methane gas for use, labor, including consumables except listed under City Responsibilities, required for maintenance and operation of the Fuel Cell System Power Plant on a seven (7) day a week, twenty four hour (24) per day basis, including but not limited to (a) provision of either new or remanufactured parts, as acceptable to City, and upon replacement, Contractor, may at its option, take title to such replaced parts or components; (b) provision on all tooling necessary to perform its obligations under Agreement; (c) coordination of all operation and maintenance activities with City; and (d) allowing City's maintenance personnel to observe, Contractor's personnel as they perform operation and preventative maintenance activities and procedures. Contractor shall adhere to all manufacturer's specifications for the Fuel Cell System in the performance of this Agreement or, in the absence of applicable specifications, to the generally accepted operating practices of the electric power industry. Contractor shall comply with all state, local and federal laws applicable to operation and maintenance of the Fuel Cell Power Plant, including but not limited to CAL-OSHA safety standards and all permits required to operate the Fuel Cell Power Plant.

1.2 Contractor is responsible for all coordination with PG&E, and shall keep the City informed about communications with PG&E.

1.3 Contractor shall provide any and all necessary connections to allow all energy from the proposed system to provide WPCP requirements.

1.4 The design of the Fuel Cell System shall include equipment for an immediate, automatic and "seamless" transfer back to PG&E power in the event that the cogeneration facility becomes non-operational (planned or unplanned).

1.5 Contractor shall clearly list all requirements to be provided to it by the City throughout the duration of the contract.

1.6 Contractor shall describe customer service inquiry/complaint procedures.

1.7 Contractor shall provide a schedule of proposed project implementation.

1.8 Contractor shall make thermal energy from the Fuel Cell System available to City, without cost to City, under the following terms:

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A. Contractor shall provide the connection point in the equipment pad for delivery of hot water to WPCP's boiler/digester hot water loop.

B. City shall be responsible for: (i) the supply of potable water for use in generating hot water from the Fuel Cell System; and (ii) the receipt of hot water from the Fuel Cell System.

C. Such hot water and thermal energy shall be provided by Contractor to City free of charge.

1.9 Preventative Maintenance: Contractor shall be responsible for providing technical service, parts and consumables associated with preventative maintenance as specified in the Fuel Cell System Manufacturer's Maintenance Manual. Preventative Maintenance as used herein shall mean in relation to any component of the Plant, the minor inspection, major inspection, part cleaning, replacement, and performance of other scheduled maintenance with respect thereto, in order to keep the Power Plant that has been otherwise operated and maintained by Contractor pursuant to the terms of this Agreement as set forth in Contractor's Operations and Maintenance Manual(s), in good working order. Scheduled maintenance activities shall be avoided during the months of June through October and shall only be allowed upon express approval of City and close coordination with Plant operations.

1.10 Unplanned Maintenance: Contractor shall be responsible for providing Repair of the Fuel Cell System Power Plant in accordance with this Agreement whenever during the Term such Repair is determined by Contractor to be necessary. Contractor shall use best efforts to effect immediate and remote diagnostics upon notification to Contractor by City of a malfunction of the Fuel Cell Power Plant. Upon Contractor's determination that a malfunction of the Fuel Cell Power Plant cannot be remedied remotely, Contractor shall use best efforts to dispatch service personnel to the site within 24 hours of notification of malfunction.

1.11 Power Plant Performance Warranty: Contractor must provide proof of minimum five year warranty to protect the Fuel Cell System against degradation in electrical output of more than 10% from the originally rated output. This proof must follow the requirements listed in section 2.5.11.1 in SGIP handbook.

1.12 List of personnel: Contractor shall submit names of personnel along with their position, responsibility, hours of work and important information to City to keep track of people working on the Site. The list shall include information of the shift supervisor and back up personnel for each scheduled shift. No one will be allowed to enter the Site if they are not in the list or it is not their working hours. Contractor shall always have personnel available and will provide a telephone number that is always attended in the event of emergency. Any changes should be brought to the

attention of the project manager in writing. If the project manager is not available, such as during the night shift, then the Contractor shall coordinate with the Shift Supervisor or the Computer Room Operator. Contractor shall bring up any changes immediately as they are known. The changes should not involve additional personnel that names do not appear anywhere on the list. Any additional personnel to the list should be brought to the attention of the project manager. Only the project manager may allow additional personnel.

1.13 List of equipment: Contractor shall submit a list of equipment that they will store on site. The list will include a description, serial number, quantity and any other information that City will need to keep track of the equipment. Any addition should be brought to the attention of the project manager, and Contractor shall submit an updated list.

1.14 List of parts and materials: The Contractor shall submit a list of all parts and materials stored on site. This list shall not include spare parts submitted to the City as part of the construction phase. Any additions shall be brought to the attention of the project manager and Contractor shall submit an updated list.

1.15 Schedule: Contractor shall submit a yearly schedule for review by the project manager. The first schedule shall be submitted at the beginning of the contract and successive schedule will be submitted ten (10) days before the end of the previous year. Any changes on the schedule will be brought to the attention of the project manager, and Contractor shall submit an updated schedule. The schedule shall include the reading of the energy meter as a basis for payment.

1.16 Operations & Maintenance Log: Contractor shall keep a log of operation and a log of maintenance which shall be available to City staff at anytime. At the end of the contract, a copy of the logs shall be surrendered to City.

1.17 Fuel Cell Module Replacement: Contractor shall provide Module replacement within the terms of the PPA.

1.18 Compliance with PG&E SGIP for commissioning and acceptance testing: Contractor shall submit the proof of project milestone per section 4.4.1 of SGIP handbook, and get it approved by PG & E program administrator before June 18, 2010. This shall include completed project milestone checklist per above mentioned section. After the approval of the project milestone, the program administrator will issue an incentive claim form. Upon project completion and prior to reservation expiration date (April 21, 2011), the completed Incentive claim form must be submitted along with all of the necessary documentation per section 4.5 to request an incentive payment. In case, the project cannot be

completed before the reservation expiration date mentioned above, the next incentive reservation expiration date will be October 21, 2011 but the contractor will have to submit the request for extension to PG &E per section 4.5.1

2. City's Responsibilities:

2.1 City will design the foundation platform per the Contractor's supplied layout design and equipment weights. City will not design the anchorage calculations.

City will install the following items:

The City will install all the required underground conduits, including the ground grid around the complete FCE site including switchgear and the gas treatment skid. Additional clarifications are as follows:

-City will provide underground utility conduits running to and from City's equipment (fuel lines, electric line, water and drain lines).

-City will provide power, control and communication raceways from City's switchgear all the way up to high voltage terminal box and control panel located on the equipment platform and provided by PPA provider.

-City will provide an underground tunnel/path between gas cleaning skid and FCE site and run various conduits/pipes interconnecting the gas cleaning skid and the FCE site based on approved drawing provided by the PPA provider

-City will provide embedded conduits in the platform for interconnecting various components mounted of the Fuel cell skid. The PPA provider must show these embedded conduits on the fuel cell layout drawings. Any exposed conduits running above the platform shall be the responsibility of the PPA Provider.

PPA provider will supplement the above work as follows:

Extend and terminate the conduit stub-outs (provided by City) on the fuel cell slab to the various components/equipment on the Fuel Cell skid.

Install valves, regulators, flow meters, gauges, metering wherever required on the utility lines.

Run all utility and other exposed conduits and pipes on the Fuel Cell skid and the gas cleaning skid

Run cables through City provided raceways and terminate all connections required for complete installation of the fuel cell and the gas cleaning skid.

2.2 City shall provide Contractor a connection point for natural gas necessary for Contractor's operation of the Fuel Cell System. Contractor shall be responsible for the cost to install a natural gas meter (revenue grade) as well as the ongoing cost and monthly charges measured by said meter for any natural gas used by Contractor for the operation of Fuel Cell System.

SGIP limits the use of natural gas to 25% annually. City will provide NG line (at no cost to contractor) only for limited uses which are technically necessary or under limited availability of digester gas due to some system failure. Under the normal circumstances, only digester gas shall be used.

2.3 Due to the continuous nature of the process, of which bio gas formation is an essential part, we do not expect the potential loss of digester gas.

2.4 City shall provide connections for digester gas from the existing digesters, hot water, recycled water (only if allowed pursuant to manufacturer specifications and requested by Contractor), and potable water if needed, between the WPCP and the Fuel Cell System site as shown in the Project Design and construction drawings to be provided by the contractor. All such interconnection points shall be mutually agreed upon by City and Contractor.

In the event the City is unable to supply ADG, it will supply NG at City's expense. City will negotiate reasonable provisions in the agreement for circumstances under which it cannot obtain sufficient NG supply to run the system at least at 90% efficiency.

2.5 There is reserved to City the right to construct or reconstruct facilities and appurtenances in, upon, under, across and along the grounds of the WPCP and in connection therewith, the right to convey to others easement rights and interests to the WPCP, including the Fuel Cell System site, provided such rights and interests do not unreasonably interfere with the Fuel Cell System or the Contractor's operations on the Fuel Cell System Site, and Contractor hereby consents to such any easement. Contractor recognizes that the WPCP includes buildings and other improvements and Contractor shall not damage or destroy such buildings or improvements.

2.6 Following receipt of the RFP Agreement Confirmation Letter and City's approval of the Project Design, City shall construct the Interface Facilities shown the Project Design and construction drawings for the Fuel Cell System. Ownership of the Interface Facilities shall be vested in City upon the construction thereof. Contractor shall execute any documents required to assure such vesting.

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3. No Responsibility of City:

3.1 Except for the payments for Electricity pursuant to the Power Purchase Agreement, City shall have no obligation, and have no liability of any kind or character, for the payment of labor, equipment, materials, or otherwise in connection with the design, construction, operation, repair or maintenance of the Fuel Cell System, or for any contracts or subcontracts in connection therewith. Contractor shall be responsible for all such matters.

3.2 City shall not be deemed to have incurred or assumed any obligation or responsibility in connection with any improvements performed or constructed by Contractor at the WPCP. Nothing in this Agreement or any act or failure to act on the part of City shall be construed as a warranty or representation as to the adequacy or fitness of the Fuel Cell System or, except as expressly provided herein, as a waiver of a claim by City for any defect or deficiency with respect to the Fuel Cell System.

4. Interface Utilities:

A. All costs associated with the construction of the Interface Utilities for the Fuel Cell System, except those included in City's responsibilities, shall be paid by Contractor.

B. City shall, at its own cost and expense, be responsible for the following utility connections, services, and charges for the Fuel Cell System:

   1. **Potable and/or Reclaimed Water**. City shall provide potable and/or reclaimed water service required by the Fuel Cell System, which shall include, but not be limited to, meter and service connection charges, service charges based upon the amount of water consumed by the Fuel Cell system. City's hot water loop carries type-1, corrosion resistant clear water. This is tested daily for hardness control

   2. **Wastewater/Sewer**. City shall provide wastewater and sewer service to Contractor required by the Fuel Cell System. City shall at its expense, accept non-hazardous wastewater from the Fuel CellSystem into City's wastewater treatment system.

C. During the term of this Agreement, City shall, at its own cost and expense, arrange for the provision of sewer, waste heat recovery system water supply and other ancillary services for the Fuel CellSystem.

D. Contractor shall be responsible for proper disposal of all hazardous waste generated in the course of its performance under this Agreement.

E. During the term of this Agreement, City shall, at its sole cost and expense, arrange to supply and deliver digester gas to the Fuel Cell System. City shall not be liable to Contractor, including any consequential costs or loss of profit, if the WPCP fails to

produce a sufficient amount of digester gas from its existing digesters to operate the Fuel Cell System.

5. Utility Interconnection between Digester Cleaning Skid and the fuel cell pad:

City will provide electrical raceways, gas pipe lines and other connections per the Fuel Cell Vendor design.

6. Ancillary Support

6.1 Ancillary Support: Contractor shall arrange to get the following (a) one analog phone line and high-speed access link to the Fuel Cell System Power Plant for remote monitoring; (b) provide ancillary utilities for the operation of the Fuel Cell System Power Plant; (c) City will provide onsite storage of replaced Consumables, including waste, but Contractor will arrange and pay for the removal and proper disposal of replaced Consumables and other wastes; (d) provide Contractor with biannual water and fuel analyses; and City may, but shall not be obligated to, provide City staff to assist in operation of the Fuel Cell System Power Plant; it is expressly understood that the purpose for providing such assistance shall be to provide additional training to City staff in operation of the Fuel Cell System Power Plant. Failure of the City to provide such staff assistance shall not operate to reduce or relieve Contractor's obligation to provide operations and maintenance services.

The Power Purchase Agreement (PPA) provider will get a dedicated telephone line of multiple pairs to support the telephone and the data communication needs. The PPA provider will work with AT&T to get the line and locate the telephone box inside the WPCP property. City will provide the communication raceway from the fuel cell skid to the telephone box.

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